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No. 96-1487-CFY Title: United States, Petitioner
Status: GRANTED v.
Hosep Krikor Bajakajian

Docketed: Court: United States Court of Appeals for
March 19, 1997 the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Blatt,James E.

Entry	Date	Note	Proceedings and Orders
1	Feb 5 1997	G	Application (A96-564) to extend the time to file a petition for a writ of certiorari from February 16, 1997 to March 18, 1997, submitted to Justice O'Connor.
2	Feb ' 1997		Application (A96-564) granted by Justice O'Connor extending the time to file until March 18, 1997.
3	Mar 18 1997	G	Petition for writ of certiorari filed. (Response due April 25, 1997)
5	Apr 17 1997		Order extending time to file response to petition until April 25, 1997.
6	Apr 25 1997		Brief of respondent Hosep Krikor Bajakajian in opposition filed.
7	May 6 1997		DISTRIBUTED. May 22, 1997 (Page 1)
8	May 9 1997	X	Reply brief of petitioner United States filed.
9	May 27 1997		Petition GRANTED. SET FOR ARGUMENT November 4, 1997. **********
10	Jul 11 1997	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
12	Jul 11 1997		Order extending time to file brief of petitioner on the merits until July 14, 1997.
13	Jul 14 1997		Brief of petitioner United States filed.
15	Jul 31 1997		Order extending time to file brief of respondent on the merits until September 2, 1997.
16	Sep 2 1997		Brief of respondent Hosep Krikor Bajakajian filed.
17	Sep 2 1997		Brief amicus curiae of Clarendon Foundation filed.
18	Sep 12 1997		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
19	Sep 16 1997		CIRCULATED.
21	Sep 25 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
20	Sep 26 1997		Record filed.
		*	Original record proceedings United States Court of Appeals for the Centeral District of California.
22	Oct 6 1997	X	Reply brief of petitioner United States filed.
23	Nov 4 1997		ARGUED.

Supreme Court, U.S.
FILED

961487 MAR 18 1997

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Whether 18 U.S.C. 982(a)(1) is per se unconstitutional under the Excessive Fines Clause of the Eighth Amendment insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without the filing of a required report.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 84 F.3d 334.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. A petition for rehearing was denied on November 18, 1996. Pet. App. 15a. On February 7,

1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 5316 of Title 31, United States Code, provides in relevant part:

> (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
>
> (A) from a place in the United States to or through a place outside the United States;
>
> * * * * *
>
> (b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. * * *
>
> * * * * *

Section 5322(a) of Title 31, United States Code, provides:

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324) shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Section 982(a)(1) of Title 18, United States Code, provides in part:

> The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. * * *

STATEMENT

On his plea of guilty in the United States District Court for the Central District of California, respondent was convicted on one count of willfully failing to report the transportation of $357,144 out of the United States, in violation of 31 U.S.C. 5316(a) and 5322(a). The district court held that, although 18 U.S.C. 982(a)(1) required the court to order respondent to forfeit the unreported currency to the United States, the imposition of a forfeiture greater than $15,000 would violate the Excessive Fines Clause of the Eighth Amendment. The court thus ordered a forfeiture in the latter amount. Pet. App. 16a-19a. The court of appeals affirmed, holding that the forfeiture of any of the unreported currency as a sanc-

tion for a reporting violation is unconstitutional. *Id.* at 1a-14a.

1. On June 9, 1994, respondent Hosep Bajakajian was in Los Angeles International Airport, waiting to board a flight to Syria, when U.S. Customs inspectors discovered approximately $140,000 concealed in respondent's checked luggage and another $90,000 in a false bottom of one of his bags. An inspector stopped respondent and his family in the airport and informed them that they were required to report all money in their possession and in their luggage that exceeded $10,000. Respondent told the inspector that he had $8,000 and that his wife had $7,000. App., *infra*, 2a-3a; Plea Agreement 7 (Oct. 27, 1994).

Customs inspectors eventually discovered $357,144 concealed by respondent and his wife. After respondent was advised of his rights, he admitted to Customs agents that he knowingly and willfully failed to report the cash. App., *infra*, 3a.

2. On July 8, 1994, respondent was indicted in the United States District Court for the Central District of California. He was charged with one count of willfully failing to report the export of currency in excess of $10,000, in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a); one count of making a false material statement to the United States Customs Service, in violation of 18 U.S.C. 1001; and one count of criminal forfeiture of the undeclared funds under 18 U.S.C. 982(a)(1). App., *infra*, 3a.

On October 27, 1994, respondent pleaded guilty to the failure-to-report count and agreed to a bench trial on the forfeiture count. The government agreed to dismiss the false statement count at sentencing. App., *infra*, 3a.

At the bench trial on the forfeiture count, the parties proffered evidence that respondent had given three different explanations about the source of the funds he had concealed. Respondent first told Customs agents that a friend named Abe Ajemian had lent him approximately $200,000, that approximately $28,000 was his own, and that various friends and relatives had lent him the remaining $130,000. Gov't Trial Mem. 5 (filed Nov. 28, 1994). Ajemian told Customs agents, however, that he had not lent respondent $200,000. *Id.* at 5-6. Respondent then claimed that Saeed Faroutan lent him $170,000. *Id.* at 6. Faroutan, however, told Customs agents that he had made no such loan and that respondent had asked him to lie about it. *Ibid.* Respondent finally claimed that Ajemian and six others had provided $185,000 and that the rest belonged to him. Def. Trial Mem. 2-3 (filed Dec. 15, 1994). Respondent also claimed that he owed money to his cousin and that he had intended to travel to Cyprus to deliver the money to his cousin. *Id.* at 3.

Following the bench trial, the district court found that the entire $357,144 discovered by Customs agents was involved in respondent's offense, and that those funds were therefore subject to forfeiture under 18 U.S.C. 982(a)(1). App., *infra*, 16a. At sentencing, however, the court ordered respondent to forfeit only $15,000, ruling that forfeiture of more than that amount would be "grossly disproportionate" to respondent's culpability and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.* at 17a-18a. The court stated:

> I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal. I do believe that,

> even though it's a somewhat suspicious and confused story, documented in the poorest way, and replete with past misrepresentation, that the funds were * * * borrowed funds.
>
> * * * * *
>
> And I think the evidence has developed that [respondent's] state of mind * * * grew out of * * * distrust for the Government. * * * So, the amount of forfeiture will be modest, and will be very very minor, because in truth, and, in fact, I think none should be forfeited.

Ibid. The court also sentenced respondent to three years' probation and fined him $5,000. *Id.* at 18a-19a.

3. The court of appeals affirmed. App., *infra*, 1a-14a. The court applied a two-part test under which a forfeiture is constitutional under the Excessive Fines Clause only if "(1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner." *Id.* at 5a. The court held that the money concealed by respondent failed to satisfy the instrumentality component of that test. The court reasoned that money involved in a violation of Section 5316 can never be an instrumentality of that offense, because "[t]he crime is the withholding of information * * * not the possession or the transportation of the money." *Id.* at 6a.

The court concluded that its holding did not conflict with this Court's decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), which, in rejecting a double jeopardy claim, upheld as remedial the civil forfeiture of gems that had not been declared when the owner entered the

country. App., *infra*, 7a-8a. The "key difference," the panel stated, "is that a violation of § 5316 merely deprives the government of information, whereas the smuggling of goods across the border deprives the government of revenue." *Id.* at 8a.

Having concluded that only an instrumentality of an offense is subject to forfeiture under the Excessive Fines Clause, and that money involved in a violation of Section 5316 is not an instrumentality of that offense, the court held that "[f]orfeiture of any amount" of respondent's undeclared money "would be unconstitutionally excessive under * * * [the] Excessive Fines Clause." App., *infra*, 9a. The court affirmed the judgment of the district court ordering the forfeiture of $15,000 only because respondent failed to cross appeal and therefore could not challenge the district court's judgment. *Id.* at 9a-10a.

Judge Wallace concurred in the judgment of affirmance, but sharply disagreed with the majority's Eighth Amendment analysis. App., *infra*, 10a-14a. Judge Wallace concluded that money involved in a violation of Section 5316 is an instrumentality of that offense, because "without the currency, there can be no offense." *Id.* at 13a. In ruling otherwise, Judge Wallace emphasized, "the majority strikes down a portion of 18 U.S.C. § 982(a)(1), thereby unduly limiting the government's forfeiture powers." *Id.* at 10a. Judge Wallace nonetheless voted to affirm the district court's judgment, because he concluded that the district court did not commit clear error in finding that a $15,000 forfeiture was proportional to respondent's culpability. *Id.* at 13a-14a.

The government's petition for rehearing and suggestion for rehearing en banc were denied. Judge Wallace voted to grant both the petition for rehearing

and the suggestion for rehearing en banc. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held in this case that the criminal forfeiture of currency that is transported (or about to be transported) into or out of the United States without the reporting required under 31 U.S.C. 5316 is per se unconstitutional under the Excessive Fines Clause. That holding invalidates a portion of an Act of Congress. It conflicts with the Second Circuit's decision in *United States* v. *United States Currency in the Amount of $145,139*, 18 F.3d 73, cert. denied, 115 S. Ct. 72 (1994). And the decision is incorrect. Under long-standing principles, the forfeiture of instrumentalities of crime, such as goods that are smuggled into or out of the country, is a proportionate, not excessive, "fine." And even if the undeclared currency were not viewed as an instrumentality of the crime in this case, criminal forfeiture is not limited to "instrumentalities." So long as the penalty is not excessive in relation to the criminal conduct, forfeiture, like any other monetary penalty, may constitutionally be imposed. Under that analysis, forfeiting the smuggled currency as a sanction for the felony of willfully failing to report the transportation of the cash is not excessive. For the above reasons and because the court of appeals' decision undermines the enforcement of the nation's currency reporting requirements, review by this Court is warranted.

1. In 18 U.S.C. 982(a)(1), Congress provided that, in imposing sentence for specified offenses, the court "shall order" forfeiture of "any property, real or personal, involved in such offense, or any property traceable to such property." One of the specified statutes is 31 U.S.C. 5316, which provides in relevant part that a person must file a report when that person knowingly "transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). Money that is not reported in violation of Section 5316 is "involved" in that offense and is therefore subject to mandatory forfeiture under Section 982(a)(1).

The court of appeals acknowledged as much. App., *infra*, 4a. The court ruled, however, that the forfeiture required by Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses. The court's sweeping constitutional holding is unambiguous: "Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316." *Id.* at 8a. In that class of cases, the court believed, "there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test" and "[f]orfeiture of any amount would be unconstitutionally excessive." *Id.* at 8a-9a. As Judge Wallace explained, the Ninth Circuit thereby invalidated on constitutional grounds the portion of Section 982(a)(1) that requires the criminal forfeiture of currency that is not reported in violation of Section 5316. *Id.* at 10a (concurring in the judgment). That invalidation of a significant portion of an Act of Congress warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

2. The court of appeals' holding that forfeiture of undeclared currency is per se unconstitutional under the Excessive Fines Clause conflicts with the Second Circuit's decision in *United States Currency in the Amount of $145,139*, *supra*. In that case, the defendant failed to report $145,139 in currency and $150 in travelers checks that he was about to transport, and the district court ordered the entire amount forfeited pursuant to the civil forfeiture provisions of 31 U.S.C. 5317(c).[1] 18 F.3d at 74. Rejecting the contention that forfeiture constituted a second criminal punishment within the meaning of the Double Jeopardy Clause, the Second Circuit held that the money was subject to civil forfeiture as an "instrumentality" of the offense. *Id.* at 75. The court explained that the money "was the 'means' by which the crime was committed. * * * Indeed, it was the very *sine qua non* of the crime." *Ibid.* The court continued:

> Clearly, it is much more accurate to describe the currency as the means by which the crime was committed than it would be to so describe a house from which drugs had been sold or an automobile in which they had been transported. If, as we have held, a house can be considered an instrumentality of the crime, * * * we would be blinking reality if we held that the money in the instant case was any less an instrumentality.

Ibid. (citation omitted). The Second Circuit also rejected the contention that forfeiture of the money

[1] Section 5317(c) provides in relevant part: "If a report required under section 5316 with respect to any monetary instrument is not filed * * *, the instrument * * * may be seized and forfeited to the United States Government."

violated the Excessive Fines Clause, ruling that "it clearly was not excessive." *Id.* at 76. The court noted that "Congress clearly intended that the liability for failure to declare, whether by forfeiture or fine, can be equal to the amount of the monetary instrument involved," and that the "Secretary [of the Treasury] is empowered to remit any portion of the forfeiture or civil penalty that he deems proper." *Ibid.*

The Second Circuit's conclusion that the undeclared currency is an instrumentality of the offense and that the forfeiture of the currency is therefore not an excessive fine cannot be reconciled with the Ninth Circuit's decision here. In the Ninth Circuit, the government is foreclosed from forfeiting smuggled currency, while in the Second Circuit forfeiture of the entire undeclared sum is allowed on an instrumentality theory. That conflict among the circuits warrants resclution by this Court.[2]

3. The court of appeals' decision is incorrect. First, the court erred by concluding that the forfeiture of undeclared currency cannot be justified on an instrumentality theory. Second, even if the un-

[2] The Second Circuit's decision cannot be distinguished on the ground that it involved a civil rather than a criminal forfeiture. The Ninth Circuit applies the same excessive fines test to civil and criminal forfeitures statutes. *United States* v. *$69,292.00 in U.S. Currency*, 62 F.3d 1161, 1166-1168 (1995). The decision in this case therefore precludes civil as well as criminal forfeiture in the Ninth Circuit. Moreover, as discussed, *infra*, if property may be subjected to *civil* forfeiture consistent with the Excessive Fines Clause, generally speaking the same property may be subject to *criminal* forfeiture without violating that Clause. *United States Currency in the Amount of $145,139* therefore necessarily establishes that the criminal forfeiture of unreported currency may constitutionally be ordered in the Second Circuit.

declared cash were not viewed as an instrumentality of the crime, the *criminal* forfeiture of property involved in an offense is still not excessive where, as here, the financial penalty is a proportionate punishment for the nature and gravity of the offense.

a. Since the First Congress, this nation's laws have provided for the forfeiture of goods involved in customs offenses. See, *e.g.*, Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39 (providing that, where goods were unloaded at night or without a permit, "all goods, wares and merchandise, so landed or discharged, shall become forfeited"). Those laws reflect the view that, when property is imported without compliance with declaration and reporting requirements, it is a reasonable remedy to confiscate the property unlawfully imported. In *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), this Court held, in rejecting a claim under the Double Jeopardy Clause, that the civil forfeiture of such smuggled goods serves legitimate remedial ends. In that case, a defendant who entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring was acquitted of criminal smuggling charges. Following the acquittal, the government instituted a civil forfeiture proceeding against the stones and ring. This Court held that the Double Jeopardy Clause did not bar the forfeiture proceeding, noting that the civil forfeiture served remedial rather than punitive purposes. *Id.* at 235-237. The Court explained that the forfeiture of undeclared property "prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government

for investigation and enforcement expenses." *Id.* at 237. "[S]uch purposes," the Court noted, "characterize remedial rather than punitive sanctions." *Ibid.*

This Court has made clear that the remedial characterization of such customs forfeitures applies equally under the Excessive Fines Clause. In *Austin* v. *United States*, 509 U.S. 602 (1993), the Court held that, while civil *in rem* forfeitures involve a sufficient element of punishment to warrant scrutiny under the Excessive Fines Clause, civil forfeitures that can be justified as remedial are not "excessive" within the meaning of that Clause. *Id.* at 622 n.14; see also *United States* v. *Ursery*, 116 S. Ct. 2135, 2146 (1996). The Court in *Austin* cited *One Lot Emerald Cut Stones* as an example of such a remedial forfeiture, stating that "forfeitures of goods involved in customs violations" are justified as a remedial sanction. *Austin*, 509 U.S. at 621.

The forfeiture of money involved in undeclared currency violations is indistinguishable from the forfeiture of the gems in *One Lot Emerald Cut Stones* and is therefore not constitutionally excessive. Like smuggled gems, undeclared currency is the very item hidden from the government and is therefore the central instrumentality of the offense. Pet. App. 13a (Wallace, J., concurring in the judgment) ("without the currency, there can be no offense"). And here, as in *One Lot Emerald Cut Stones*, forfeiture of the undeclared item is fully justifiable as serving remedial purposes. Forfeiture of undeclared currency, like forfeiture of hidden gems, serves the remedial goal of encouraging persons to report information that enables the government to carry out an important regulatory function. In *One Lot Emerald Cut Stones*, the information determined the gems' exposure to

duties and their admissibility into the United States; in the currency reporting context, the information has "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311; see *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63 (1974) (reporting requirement singles out transactions found to have the greatest potential for circumventing the enforcement of the laws of the United States). And forfeiture of undeclared currency, like forfeiture of smuggled gems, also "provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." *One Lot Emerald Cut Stones*, 409 U.S. at 237.

The court of appeals sought to distinguish forfeiture of undeclared currency from forfeiture of smuggled gems on the ground that Section 5316 does not make unlawful "the illegal possession, transportation, or smuggling of dutiable items," but only "the failure to provide information." App., *infra*, 7a-8a; accord *United States* v. *Dean*, 80 F.3d 1535, 1539 n.1, modified, 87 F.3d 1212 (11th Cir. 1996). That description of the offense is incomplete. The offense is not merely the failure to report, but the failure to file a report when "transport[ing] monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). The essence of the offense is therefore smuggling money out of the country, not simply failing to file a report. The Ninth Circuit also found it significant that, in *One Lot Emerald Cut Stones*, the smuggling of goods deprived the government of revenue in the form of duties. App., *infra*, 8a. But this Court did not mention that factor

as a basis for its conclusion that the forfeiture was remedial. 409 U.S. at 237. And the harm to the government from reporting violations, though not directly quantifiable, is considerable. The economic power of much criminal activity depends on money laundering that secretly moves cash into and out of the country. Tracing the flow of currency plays a vital role in attacking global criminal activity. Given the major drain on the economy of such illicit financial activities, crimes that allow unreported dollars to circulate throughout the world inflict significant harm.

In sum, undeclared cash that is brought into or taken out of this country is subject to forfeiture because the money is instrumental to the violation. This Court has made clear that the forfeiture of such smuggled goods fulfills legitimate remedial goals. The remedial character of those forfeitures establishes that they are not excessive fines.

b. Even if the court of appeals were correct in concluding that unreported currency is not an instrumentality of the failure-to-report crime, the court erred in holding that a forfeiture is per se excessive unless the item seized can be characterized as an instrumentality of the offense. Although criminal forfeitures can often be fully justified as a remedial sanction, they need not be. Such forfeitures may also be justified as a punishment. As the Court held in *Alexander* v. *United States*, 509 U.S. 544 (1993), in personam forfeiture is "a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Id.* at 558. Thus, while civil *in rem* forfeiture generally targets contraband, instrumentalities of crime, and proceeds of criminal activity (see *id.* at 563 (Kennedy, J., dissenting);

United States v. *92 Buena Vista Ave.*, 507 U.S. 111, 118-123 (1993) (plurality opinion)), criminal forfeiture may constitutionally include property outside those categories, as long as the value of the property forfeited is not excessive when compared to the nature of the criminal offense. See *Alexander*, 509 U.S. at 559.

In the context of a criminal prohibition that authorizes as punishment a $250,000 fine, a five-year term of imprisonment, or both (see 31U.S.C. 5322(a)), the forfeiture of the very money involved in the failure-to-report offense is not excessively punitive. See *United States* v. *Elder*, 90 F.3d 1110, 1132-1133 (6th Cir.), cert. denied, 117 S. Ct. 529 (1996), 117 S. Ct. 993 (1997); *United States* v. *Milbrand*, 58 F.3d 841, 848 (2d Cir. 1995), cert. denied, 116 S. Ct. 1284 (1996); *United States* v. *Wild*, 47 F.3d 669, 676 (4th Cir.), cert. denied, 116 S. Ct. 128 (1995); *United States* v. *Myers*, 21 F.3d 826, 830 (8th Cir. 1994), cert. denied, 115 S. Ct. 742 (1995). Indeed, such a forfeiture is perfectly calibrated to the seriousness of the offense since the amount of the fine increases in direct proportion to the amount that is concealed.

Nothing in this case suggests that forfeiture of the undeclared cash was an excessive fine. Respondent willfully violated the reporting requirement and then lied about the source of the funds he concealed. For that conduct, he was sentenced to three years' probation and fined $5,000. To add to that sentence a forfeiture of the money he concealed cannot possibly be constitutionally excessive. App., *infra*, 18a. The court of appeals' holding that the criminal forfeiture of even $1 of undeclared currency violates the Excessive Fines Clause is manifestly wrong.

4. The issue in this case has great practical significance to the government's enforcement of the currency reporting laws. By invalidating the statute that provides for forfeiture of undeclared currency, the decision in this case allows currency smuggled into or out of the United States within the jurisdiction of the Ninth Circuit to escape confiscation by the government as a sanction for reporting violations. As a result, the United States is deprived of an effective tool for detecting and deterring illegal activity that involves large amounts of cash. While the lower courts found that the currency in this case had a legitimate source, the court of appeals made no distinction between currency that has a legitimate source and cash that is linked to illegal activity. Currency that represents drug proceeds, international money laundering, or funds involved in tax evasion is particularly likely to be smuggled out of the country in violation of the reporting requirements, yet under the decision below, all such currency may escape seizure as a sanction for non-reporting in those areas included within the Ninth Circuit.

The harmful effects of the Ninth Circuit's decision have already begun to be felt. Statistics gathered by the Treasury Department reflect a sharp and precipitous drop in seizures of unreported currency in the Ninth Circuit in the months following the decision below. The danger of even more serious consequences cannot be discounted. The Ninth Circuit contains major international airports and seaports, has extensive land borders with Mexico and Canada, and includes major international banking centers for persons wishing to conduct transactions in Asia, Central America, and South America. With the gov-

ernment's enforcement authority constrained, that region of the country could readily become a haven for drug dealers, money launderers, and tax evaders intent on conducting non-traceable currency transactions. Because the court of appeals' erroneous holding will have substantial adverse effects on the enforcement of federal currency reporting requirements, review by this Court is particularly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50094
D.C. No. CR-94-00544-JD (JR)-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HOSEP KRIKOR BAJAKAJIAN, AKA: JOE BAJAKAJIAN, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

[Filed: May 20, 1996]

OPINION

Before: J. CLIFFORD WALLACE, WARREN J. FERGUSON, and THOMAS G. NELSON, Circuit Judges.

Opinion by Judge FERGUSON; Concurrence by Judge WALLACE.

FERGUSON, Circuit Judge:

The United States appeals the decision of the district court following the defendant's guilty plea to

failure to report currency in violation of 31 U.S.C. § 5316(a)(1)(A).[1] Specifically, the United States appeals the district court's determination that the defendant was required to forfeit only $15,000 of the $357,144 at issue.[2] We affirm the decision of the district court.

I. Factual and Procedural Background

On June 9, 1994, Bajakajian was attempting to board an Alitalia Airways flight leaving Los Angeles, destined for Cyprus. While Bajakajian was waiting to board his flight, U.S. Customs discovered approximately $140,000 concealed in four pieces of Bajakajian's checked luggage and $90,000 concealed in a false bottom of one of his bags. After discovering the hidden currency, a Customs inspector stopped the defendant and his family at the airport and informed them that they were required to report all money in both

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[1] 31 U.S.C. § 5316(a) provides in pertinent part: a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States. . . .

[2] In addition to appealing the district court's decision regarding the amount of currency which Bajakajian should be required to forfeit, the government has also appealed the district court's calculation of Bajakajian's base offense level and the district court's failure to enhance Bajakajian's sentence for obstruction of justice. However, this opinion only addresses the government's appeal of the district court's forfeiture calculation. The remaining issues will be resolved in a separate disposition.

their personal possession and baggage which exceeded $10,000, irrespective of whether the money belonged to them. Bajakajian told the Customs inspector that he had $8,000 with him and that his wife had an additional $7,000. Bajakajian informed the inspector that his family had no additional money to report.

Customs inspectors discovered a total of $357,144 in United States currency in the carry-on baggage, checked-in baggage, wallet, and purse of the defendant and his wife. After being advised of his rights, Bajakajian admitted to Customs agents that he knowingly and wilfully failed to report the currency which was discovered.

On July 8, 1994, a grand jury returned a three count indictment against the defendant. Count One charged the defendant with violation of 31 U.S.C. §§ 5316(a)(1)(A) and 5322(a) for transporting currency of more than $10,000 outside of the United States without filing a report with the United States Customs Service. Count Two charged the defendant with making a false material statement to the United States Customs Service in violation of 18 U.S.C. § 1001. Count Three sought the forfeiture of the $357,144 discovered by Customs under 18 U.S.C. § 982(a)(1).

On October 27, 1994, pursuant to a plea agreement, the defendant entered a guilty plea as to Count One of the indictment and waived a jury trial as to Count Three. The government agreed to dismiss Count Two at the time of sentencing. On December 20, 1994, a bench trial was held for Count Three. The district court found that the entire $357,144 discovered by Customs agents was subject to criminal forfeiture

pursuant to 18 U.S.C. § 982(a)(1). However, at sentencing, the district court ordered the defendant to forfeit only $15,000 of the $357,144. The district court concluded that forfeiture of more than $15,000 would be disproportionate to Bajakajian's culpability, and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. In calculating the amount of forfeiture, the district court recognized that all of the money at issue had come from a lawful source, and was to be used for a lawful purpose.

II. —Discussion

A district court's interpretation of federal forfeiture law is reviewed de novo. *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994).

The government alleges on appeal that the district court erred in requiring forfeiture of only $15,000 because the entire $357,144 at issue should have been forfeited. In the alternative, the government requests forfeiture of $170,000, the amount of currency which Bajakajian asked a friend to lie about to Customs agents.

The forfeiture statute relevant to this litigation, 18 U.S.C. § 982(a)(1), provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31 . . ., shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property."

Therefore, pursuant to 18 U.S.C. § 982(a)(1), the entire $357,144 at issue in the present case is potentially forfeitable. However, a forfeiture is unconstitutional unless it survives scrutiny under the Excessive Fines Clause of the Eighth Amendment. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 2805 (1993) (citation omitted). See also *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 2775-76 (1993) (holding that criminal forfeiture is a form of monetary punishment subject to the Eight Amendment's Excessive Fines Clause); *United States v. Sarbello*, 985 F.2d 716, 717-18 (3d Cir. 1993) (holding that a court may reduce an otherwise mandatory 100% statutory criminal forfeiture on the basis of the Excessive Fines Clause of the Eighth Amendment). Therefore, forfeiture in the present case must be subjected to analysis under the Excessive Fines Clause.

The Supreme Court, in *Austin*, declined to enumerate the factors to be considered in determining whether a forfeiture violates the Excessive Fines Clause. *Austin*, 113 S. Ct. at 2812. We recently addressed this issue and established a two-pronged test for determining whether a forfeiture is unconstitutionally excessive under the Eighth Amendment. *United States v. Real Property Located in El Dorado County*, 59 F.3d 974, 982 (9th Cir. 1995).

Pursuant to this court's Excessive Fines Clause test, a forfeiture is constitutional if: (1) the property forfeited is an "instrumentality" of the crime committed; and (2) the value of the property is proportional to the culpability of the owner.[3] *Id.* at 982.

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[3] The district court bypassed the instrumentality prong of the two part *El Dorado* Excessive Fines test and examined

Therefore, Bajakajian cannot be ordered to forfeit any currency unless forfeiture in the present case would satisfy both the instrumentality and proportionality prongs of our recently established Excessive Fines Clause test.

Application of the instrumentality prong of the Excessive Fines test to a 31 U.S.C. § 5316 violation was recently discussed by this court in *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995). The court questioned whether the currency involved in a § 5316 violation could ever be considered the instrumentality of the crime of failure to report. The court explained that it was not persuaded "that currency lawfully acquired and possessed has that necessarily close relationship to the crime simply because it has not been reported. The crime is the withholding of information, 31 U.S.C. § 5316, not the possession or the transportation of the money." *Id.* at 1167. The court further explained that the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed. The statute does not impose a limit on the amount of U.S. currency which may be exported to foreign jurisdictions. Persons leaving the United States are free, as they have always been, to take with them such amounts of cash as they so choose. *Id.*

This court, in *$69,292*, also rejected the argument that the currency in a § 5316 violation satisfies the instrumentality requirement based upon the notion

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only the proportionality of forfeiture in the present case. This is probably due to the fact that the Ninth Circuit's decision in *El Dorado* was handed down subsequent to the district court's decision.

that the currency's existence was a precondition to the reporting requirement of 31 U.S.C. § 5316.

> Simply put the existence of the currency as a precondition does not make it an instrumentality. For example, we would not characterize lawfully earned income an instrumentality forfeitable as such simply because a taxpayer wilfully failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an "instrumentality" to the breaking point.

Id. at 1167-68 (citation omitted). See also *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime).

The government argues that the majority opinion in *$69,292* conflicts with the Supreme Court's decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972). There, the Court upheld the forfeiture of imported goods pursuant to 19 U.S.C. § 1497,[4] where the defendant failed to declare one lot of emerald cut stones and a ring upon his entry into the United States. *Id.* at 233.

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[4] 19 U.S.C. § 1497 has since been amended, but at the time of *One Lot Emerald Cut Stones*, it provided:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

However, *$69,292* and *One Lot Emerald Cut Stones* are not in conflict. *One Lot Emerald Cut Stones* involved the smuggling of contraband. When a defendant is convicted for failure to report currency pursuant to 31 U.S.C. § 5316, the crime is not the illegal possession, transportation, or smuggling of dutiable items. Rather, the crime is merely the failure to provide information. Money in lawful possession, as it was here, is not contraband. Moreover, the currency at issue in a § 5316 violation is not contraband, is presumed to be lawfully possessed and is not subject to duty. It is not illegal to take currency out of the country. The key difference is that a violation of § 5316 merely deprives the government of information, whereas the smuggling of goods across the border deprives the government of revenue. *$69,292*, 62 F.3d at 1167. Therefore, there is a much tighter instrumentality connection between property sought to be forfeited and the crime when the crime committed is the failure to pay a duty.[5]

We hereby adopt the logic of the court in *$69,292*.[6] Forfeiture of currency is unconstitutional when the

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[5] Such a distinction is not new. *See Austin v. United States*, 113 S. Ct. 2801, 2811-12 (1993) (The Supreme Court distinguished cases involving drug forfeitures from cases involving customs violations.).

[6] The government alleges that the reasoning of the majority in *$69,292* with respect to the Excessive Fines Clause and 31 U.S.C. § 5316 is dicta because the district court might not have needed to address this issue on remand. However, this portion of *$69,292* is not dicta. "[D]irection to the district on how to proceed continues to be binding precedent, even if characterized as an alternative holding." *Operating Eng'rs Pension Trust v. Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir.) (explaining that it was not dicta for the Ninth

crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316. In such situations, there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test.[7]

Therefore, the district court erred in ordering Bajakajian to forfeit $15,000. Forfeiture of any amount would be unconstitutionally excessive under the *El Dorado* Excessive Fines Clause test. However, Bajakajian failed to file a cross-appeal requesting a modification of the district court's order that he forfeit $15,000. If an appellee seeks a modification of the district court's judgment, he must file a cross-appeal requesting the modification. Unless an appellee files a cross-appeal, "the appellee may not

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Circuit in *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069 (9th Cir. 1983) to direct the district court on how to resolve an issue on remand which might only arise, depending upon the resolution of another issue), *modified*, 778 F.2d 538 (9th Cir. 1985).

[7] The government argues that *United States v. One 1985 Mercedes-Benz*, 14 F.3d 465 (9th Cir. 1994) provides support for forfeiture in the present case. In *One 1985 Mercedes-Benz*, the court held that vehicles used to export currency in violation of 31 U.S.C. § 5316 are subject to forfeiture under 18 U.S.C. § 982. However, *One 1985 Mercedes-Benz* does not provide support for forfeiture in the present case for two reasons. First, a car used to transport money is clearly the instrumentality of a § 5316 violation because the car itself is used to export and conceal the currency. Second, *One 1985 Mercedes-Benz* was decided prior to both *El Dorado*, which established the two-pronged Excessive Fines test, and *$69,292*, which applied the *El Dorado* test for the first time to a § 5316 violation. Therefore, the facts of *One 1985 Mercedes-Benz* are not analogous to the facts of the present case, and its logic is questionable due to the recent decisions handed down by this court in *El Dorado* and *$69,292*.

attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States v. One 1964 MG*, 584 F.2d 889, 890 (9th Cir. 1978) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

Although pursuant to the Excessive Fines Clause Bajakajian cannot be ordered to forfeit any of the unreported currency, he is nonetheless forced to accept the decision of the district court. Bajakajian failed to file a cross-appeal, and therefore, this court lacks jurisdiction to set aside the district court's forfeiture order of $15,000.

III. Conclusion

The decision of the district court is AFFIRMED.

WALLACE, Circuit Judge, concurring:

The majority takes our dicta in *United States v. $69,292.00 in U.S. Currency*, 62 F.3d 1161 (9th Cir. 1995) (*$69,292*), to an illogical extreme. In so doing, the majority strikes down a portion of 18 U.S.C. § 982(a)(1), thereby unduly limiting the government's forfeiture powers. I agree only with the majority's ultimate decision to affirm the $15,000 forfeiture. Because I would do so for entirely different reasons, I concur in result only.

We are not bound by the dicta in *$69,292*. In *$69,292*, we explained the analysis used to determine whether a forfeiture violates the Eighth Amendment. *$69,292*, 62 F.3d at 1166-67, *citing United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (*El Dorado*). To satisfy the Eighth Amendment's prohibition against excessive fines, forfeited property must be instrumental to the crime and proportional in value to the culpability of the owner. *El Dorado*, 59 F.3d at 982. In *$69,292*, the district court did not analyze the forfeiture in terms of our intervening decision in *El Dorado*. Thus, we remanded to enable the district court to make appropriate findings. *$69,292*, 62 F.3d at 1168.

The majority would read *$69,292* as holding that currency involved in a section 5316 violation is never an instrumentality of the crime. Majority at 337 & n.6. The majority's reading of *$69,292* renders all forfeitures of currency in such circumstances unconstitutional under our test in *El Dorado*. But if in *$69,292* we had held that all forfeitures of currency involved in reporting violations necessarily fail *El Dorado*, we would not have written that, "[w]e make no assessment as to whether the forfeiture meets the *El Dorado* test." *$69,292*, 62 F.3d at 1168. As Judge Rymer accurately wrote in dissent, *$69,292*'s instrumentality discussion is dicta. *Id.* at 1168 (Rymer, J., dissenting).

Not only is this *$69,292* discussion clearly dicta, but there are two additional interrelated problems—one with the majority's interpretation of the dicta in *$69,292* and one with the *$69,292* dicta itself.

First, the majority misreads our remarks in *$69,292*. We asserted there that we were not "persuaded that currency *lawfully acquired and possessed* has the necessarily close relationship to the crime simply because it has not been reported." *Id.* at 1167 (emphasis added). Our remarks were focused on the source of the defendants' funds, and we suggested that legally obtained funds might not be instrumental.

See id. (explaining that "the reporting requirement applies to all currency, whether it is lawfully gained or not," and suggesting that we should analyze forfeiture based in part on the source of the funds). If on remand the district court in *$69,292* had found that the defendants acquired the funds illegally, nothing in *$69,292* would have precluded forfeiture.

The majority, purporting to "adopt the logic of the court in *$69,292*," maj. op. at 337, overlooks *$69,292*'s underlying rationale. The majority holds that "[f]orfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316." *Id.* Thus, even if a district court finds that money was illegally acquired, the majority does not allow forfeiture. Or, even if a defendant's failure to report is combined with another violation of United States law (and the other law does not independently allow forfeiture), the majority would still not allow forfeiture. Nothing in *$69,292*'s dicta supports this result.

Second, it is precisely *$69,292*'s focus on lawfully acquired funds that makes *$69,292*'s instrumentality dicta problematic. *$69,292* suggests that instrumentality should turn, at least in part, on the source of the funds. However, I interpret the instrumentality inquiry as being completely divorced from the source of the funds. After all, why is currency any more instrumental when the currency is legally obtained as opposed to when it is illegally obtained? *See United States v. $145,139.00*, 18 F.3d 73, 75 (2d Cir.) (Currency was "an instrument of the crime [of failure to report]. It was the 'means' by which the crime was committed. . . . Indeed, it was the very *sine qua non* of the crime."), *cert. denied*, 115 S. Ct.

72 (1994); *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring) (explaining the instrumentality inquiry as being whether "property has been 'tainted' by unlawful use . . . [in other words,] whether the confiscated property has a close enough relationship to the offense" (emphasis omitted)), *quoted in El Dorado*, 59 F.3d at 982. In this case, the crime was Bajakajian's failure to report $357,144 that he had secretly stashed. I cannot agree with the majority that there is an insufficient nexus between the acquired currency and the offense—without the currency, there can be no offense.

Of course, the source of the acquired funds *does* have a place in our Eighth Amendment inquiry under *El Dorado*. However, the inquiry into the source of the funds is part of the *proportionality* analysis, not the instrumentality inquiry. *El Dorado*, 59 F.3d at 985-86 (explicitly requiring district court to consider, as part of proportionality determination, the "culpability of the owner"); *see also id.* at 983 (adopting "the proportionality test as a check on the instrumentality approach" because of the instrumentality prong's "potentially harsh results, when applied alone"). If, as the district court held, Bajakajian's funds were lawfully obtained from friends and family and were not to be illegally used, then these facts might warrant a reduced forfeiture to avoid an excessive fine.

I therefore disagree with the majority's conclusion that the currency was not instrumental as a matter of law. I would hold that the district court properly found that the entire amount of currency was potentially forfeitable. The currency was instrumental. As to proportionality, I would review for clear error

the district court's factual findings underpinning its decision to forfeit only $15,000. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996) (findings of fact underlying forfeiture reviewed for clear error). The district court found that the funds were lawfully acquired and were to be lawfully used. The district court next found that forfeiture of only $15,000 was proportional to Bajakajian's culpability. I do not believe that the district court's findings were clearly erroneous; therefore, I would affirm the $15,000 forfeiture.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50094

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HOSEP KRIKOR BAJAKAJIAN, AKA: JOE BAJAKAJIAN
DEFENDANT-APPELLEE

[Filed: Nov. 18, 1996]

ORDER

Before: WALLACE, FERGUSON, and T. G. NELSON, Circuit Judges.

Judge Ferguson and Judge T. G. Nelson have voted to deny the petition for rehearing. Judge Wallace has voted to grant the petition for rehearing. Judge T. G. Nelson has voted to reject the suggestion for rearing en banc, Judge Ferguson has recommended rejection of the suggestion for rehearing en banc. Judge Wallace has vote to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR-94-544-JGD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOSEP BRIKOR BAJAKAJIAN, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, January 19, 1995

* * * * *

[51] THE COURT: Well, the finding is expressed as follows:

"That the Government"—

"That the United States has established beyond a reasonable doubt two elements. One, [52] that on June 9th, the defendant was about to transport the funds in the—in United States currency outside the U.S., which was a violation of 31 U.S.C. 5316."

"And two, that the funds were involved in the offense. Or as the finding itself says that the—that $357,144 in United States currency was involved in the offense. The Court, therefore, finds that the Government has established criminal forfeiture pursuant to 18 U.S.C. 982(a)(1). The actual amount to be forfeited, taking into account Eighth

Amendment consideration shall be determined by the Court."

* * * * *

[61] THE COURT: All right. I thank you.

Well, the Court must make findings on the forfeiture issue, and some of those findings have already been stated and the record will reflect them.

I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal. I do believe that, even though it's a somewhat suspicious and confused story, documented in the [62] poorest way, and replete with past misrepresentation, that the funds were—the funds of the defendant, and borrowed funds.

I do believe that the elements of 2(s)1.3(b)2 have been established. That the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation to two relatives in Europe.

That the base offense level is 15. That the 2(s)1.3(b)2 requires a six-level reduction. I accept the probation officer's calculation in that respect, which results in an adjusted offense level of 9. And that the defendant is entitled to a two-level adjustment downwards for acceptance of responsibility, resulting in a total offense level of 7. The criminal history category is 1. And the defendant is—and thus this case falls within zone A, that probation is appropriate. Probation is recommended by the probation officer prosecute.

And I think that a fine is appropriate. And the maximum fine under the guidelines pursuant to 5(e)1.2 is $5,000. Because I believe U.S. versus Buscher 18 F.2d 1407, a 1987 case, requires that, even

though that, as I remember the forfeiture in that case was not pursuant to 982 18 U.S.C. 982 A.1, as it is in this case, it was pursuant to another section. That requires the Court to do [63] what the Court wishes not to do and that is to engage in the Eighth Amendment exercise, and determine what a reasonable amount for forfeiture is.

First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not under the circumstances attain—order the forfeiture of the entire 357,000 plus dollars. That would be grossly disproportionate to the offense in question. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.

And I think the evidence has developed that the defendant's state of mind at the time was—at the time he committed the offense, that is, the failure to report, I think grew out of the—out of what we talked about, out of distrust for the Government. I see no sin in recognizing these cultural differences. So, the amount of forfeiture will be modest, and will be very very minor, because in truth, and, in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

I think $5,000, the guideline maximum is too little. And I think the Government has gone to great lengths here, and expended its resources in this case, so, the amount, for forfeiture amount will be $15,000, for a total outlay by the defendant of $20,000.

There will be no incarceration, absolutely no reason to incarcerate this gentlemen, but there will be a period of probation with conditions attached, rather standard conditions attached.

* * * * *

(2)

Supreme Court, U.S.
FILED
APR 25 1997
OFFICE OF THE CLERK

No. 96-1487

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

vs.

HOSEP KRIKOR BAJAKAJIAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether forfeiture of lawfully possessed currency under 18 U.S.C. § 982(a)(1) is unconstitutional under the Excessive Fines Clause of the Eighth Amendment where the crime committed is a mere failure to report transportation of currency, in violation of 31 U.S.C. § 5316.

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OPINION BELOW

The opinion of the court of appeals (Petition's App., 1a-14a) is reported at 84 F.3d 334.

STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth with sufficient particularity and accuracy in Petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved is set forth with sufficient particularity and accuracy in Petitioner's brief.

STATEMENT OF THE CASE

A. The Offense

On June 9, 1994, Respondent and his wife attempted to board an Alitalia Airway flight leaving Los Angeles International Airport and destined for Lanarca, Syria via Rome, Italy. Unbeknownst to Respondent, his flight was the subject of an examination by a customs service canine trained to detect the presence of currency. The canine alighted on Respondent's luggage and a search of the luggage revealed $230,192.

A customs service inspector approached Respondent as he and his wife were preparing to board their flight. The inspector explained the currency reporting requirements to Respondent and his wife and asked whether they had in their possession currency in excess of $10,000. Respondent informed the inspector that he had $8,000 in his possession and his wife,

$7,000. A search of Respondent and his wife further revealed an additional $127,012. After an additional search of Respondent's luggage, the total amount of currency found in his possession was $357,144. The currency was seized and Respondent was taken into custody. Respondent was ultimately charged, in a three count indictment, with 31 U.S.C. § 5316(a)(1)(A); 31 U.S.C. § 5322(a); 18 U.S.C. § 1001; and 18 U.S.C. § 982(a)(1).

In an interview with customs agents after Respondent's arrest for the failure to declare his possession of currency in excess of $10,000, Respondent gave an explanation as to the source of the seized currency. Subsequently, Respondent provided another explanation for the source of the seized funds and, prior to sentencing, provided the government and court with documentation supporting a third explanation.

B. The Plea

On October 27, 1994, Respondent moved to change his plea of not guilty and entered a guilty plea to count one of the indictment which charged Respondent with 31 U.S.C. §§ 5316(a)(1)(A), 5322(a). Pursuant to the plea agreement, the government agreed to dismiss count two at the time of sentencing. The parties also stipulated to having count three, the forfeiture count, tried to the court as a bench trial.

On December 20, 1994, the district court found that the government had satisfied its burden that the seized funds were subject to forfeiture and the court invited the parties to submit briefs regarding the amount of forfeiture which was to be decided at sentencing.

C. Sentencing and Forfeiture

At the time of sentencing, the district court entertained argument regarding what amount of the seized currency should be forfeited, among other sentencing issues unrelated to this Petition.

In reference to the seized currency, the United States Probation Department found that the subject funds were legally obtained and for a lawful purpose. The government also conceded that Respondent had a legitimate debt in Syria and acknowledged that it had no evidence that the $357,144 were the proceeds of an unlawful activity. However, the government urged the district court to apply a proportionality analysis with the burden placed upon Respondent. The government also argued that forfeiture in the case is purely remedial but that, if forfeiture was found violative of the Eighth Amendment, the court may mitigate the amount to be forfeited.

Respondent submitted a trial memorandum and supplemental memorandum of law re: forfeiture and judicial discretion under the Eighth Amendment. In these briefs, Respondent explained and provided documentation for the sources of the $357,144, described the purpose for the currency, admitted his crime, and apologized for his transgression. Respondent, however, urged the court to exercise its discretion and mitigate the mandatory forfeiture provisions of 18 U.S.C. § 982(a)(1).

At the sentencing hearing, the district court stated:

> I do believe that the United States Currency was in the suitcase and in the carry on luggage for reasons that were not illegal. I do believe that, even though its a somewhat

> suspicious and confused story, documented in the poorest way, replete with past misrepresentations, that the funds were — the funds of the defendant, and borrowed funds.
>
> I do believe . . . that the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation. . . .

The district court reached this conclusion after hearing from both the government and Respondent. The district court ruled:

> First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not, under the circumstances attain — order the forfeiture of the entire $357,000 plus dollars. That would be grossly disproportionate to the offense in question. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.
>
> . . . So the amount of forfeiture will be modest, and will be very minor, because in truth, and in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

Thus, respondent was sentenced to three years formal probation, fined $5,000, and ordered to forfeit $15,000 of the seized currency.

D. The Ninth Circuit Appeal

The government appealed the district court's ruling, which the Ninth Circuit affirmed. Focusing on the fact that the currency was lawfully acquired and possessed, the court applied a two prong excessive fines test to the forfeiture in question. Pursuant to the Ninth Circuit's excessive fines test, forfeiture is constitutional "if (1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner."

The court held that the currency at issue was not an instrumentality of the offense and, in so holding, ruled that "[f]orfeiture of currency is unconstitutional when the crime to which forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316."

The court, relying on *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995), refused to find the seized currency an instrumentality because lawfully acquired as possessed currency lacks "that necessarily close relationship to the crime simply because it has not been reported."

> Simply put the existence of the currency does not make it an instrumentality. For example, we would not characterize lawfully earned income as instrumentality simply because a taxpayer failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an 'instrumentality' to the breaking point.

Id. At 1167-68, referring also to *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime.)

The court further explained "the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed." Thus, unlike smuggled contraband or a vehicle used to transport contraband, the unreported currency is not an instrumentality of the crime and forfeiture of any amount in violative of the Eighth Amendment's Excessive Fines Clause.

Judge Wallace concurred in the court's result but disagreed with the court's conclusion that the currency was not an instrumentality. Although Justice Wallace felt that the currency was an instrumentality of the offense, he did not believe that the district court's finding's were clearly erroneous. As such, he would affirm the $15,000 forfeiture.

REASONS FOR DENYING THE WRIT

The government misconstrues the holding in this case. Ruling that forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316, the Ninth Circuit's opinion focused on the legitimate nature of the currency in issue. The question, then, is not whether forfeiture under 31 U.S.C. § 5316 is per se unconstitutional, but whether the government is entitled to currency which was lawfully possessed and intended for a lawful purpose.

As such, this case does not strike down a portion of an Act of Congress but limits its application. This case is not in conflict with the Second Circuit's decision in *United States v. United States Currency in the Amount of $145,139*, 18 F.3d 73, *cert. denied*, 115 S. Ct. 72 (1994). Petitioner's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam) is misplaced. Finally, Petitioner would have this Court engage in a factual excessive fines analysis which was performed

appropriately in the district court. For these reasons, review by this Court is unwarranted.

1. Petitioner attempts to persuade this Court that the Ninth Circuit has held that "forfeiture required by Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses" and, as a result, the Ninth Circuit has invalidated an Act of Congress. *See United States v. Gainey*, 380 U.S. 63, 65 (1965). This characterization of the Ninth Circuit's ruling is, however, an oversimplification. The focus of the Ninth Circuit in this case, as well as in *United States v. $69,292.00 in United States Currency*, 62 F.3d 1161 (1995), is on the legitimate nature of the currency which the government seeks to forfeit.

When the case is examined in the appropriate light, Petitioner's claim of the far-reaching impact of this case is not compelling. This case does not strike down an Act of Congress but tempers the government's ability to forfeit lawful currency. The case does not address forfeiture of unreported currency related to narcotics, money laundering, or racketeering. Forfeiture of such funds is not in question. The ruling in this case does not prevent seizure of unreported currency and a subsequent investigation into the legitimacy of that currency. If the currency is somehow tainted with illegality, forfeiture is appropriate and, under this case, permissible. If, however, the currency cannot be construed as illegitimate, as with Mr. Bajakajian's currency, the government simply cannot keep it.

In this respect, the ramifications of this case are not as drastic as Petitioner claims. Forfeiture is not per se unconstitutional but is only so when the government cannot establish the illegitimacy of the funds.

2. Respondent recognizes that a square and irreconcilable conflict between federal courts ordinarily should be enough to

secure review. *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). A square and irreconcilable conflict, however, does not exist between this case and *United States v. United States Currency in the Amount of $145,139, supra*. The focus of the Second Circuit in *United States Currency in the Amount of $145,139*, was on *United States v. Halper*, 490 U.S. 435 (1989) and whether the Double Jeopardy Clause prevented forfeiture of the currency at issue. Although the Second Circuit did address the Excessive Fines Clause, that portion of the opinion was unrelated to the "instrumentality" analysis. Under these circumstances, the two opinions are readily distinguishable.

More important, however, is the fact that the Second Circuit never addressed the one critical aspect of this case: that the seized currency was legitimately possessed and intended for a legitimate purpose. Without an examination of the legitimate nature of the currency in the "instrumentality" analysis, *United States Currency in the Amount of $145,139*'s discussion of § 5316 forfeitures is incomplete and does not conflict with this case.

If this Court determines that a conflict does exist, Respondent contends that such conflict does not warrant review in this case. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied to enable the Court to address the issue at a later date.); *Bealieu v. United States*, 497 U.S. 1038, 1039 (1989) (certiorari denied even though conflict existed); *Chelsea House Publishers, et al. v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (certiorari denied even though 22 cases existed in which lower courts had split 14-8).

Furthermore, Respondent submits that the resolution of any perceived conflict herein is irrelevant to the ultimate outcome

of this case, *i.e.*, whether the government must return the seized currency. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964). Even Justice Wallace, who felt that the currency was not an instrumentality, could find no clear error committed by the district court in its factual excessive fines analysis.

3. Petitioner's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) to establish a conflict with Supreme Court precedence is misplaced. In *One Lot Emerald Cut Stones*, this Court addressed the issue of whether the Double Jeopardy Clause will bar the civil forfeiture of smuggled goods after an acquittal on the underlying criminal prosecution for customs violations. *Id.* at 235-237. This case presents none of those issues. The sole issue here is whether the forfeiture of legitimate, unreported currency violates the Eighth Amendment's proscription against excessive fines.

The property sought to be forfeited in *One Lot Emerald Cut Stones* was forbidden merchandise and forfeiture served a remedial purpose. *Id.* at 237. Forfeiture of legitimate money involved in undeclared currency violations is readily distinguishable from the forfeiture of the contraband gems in *One Lot Emerald Cut Stones*. The currency at issue in § 5316 violations is presumed to be lawfully possessed and is not subject to duty; it is not illegal to take the currency out of the country. Such was not the case with the smuggled gems in *One Lot Emerald Cut Stones*.

Forfeiture of property which is not contraband has been addressed previously by this Court. In *Austin v. United States, supra*, at 621, the Court relied on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965), to contrast forfeitures of contraband against forfeitures of items which are legally possessed but used in the commission of crime. In both *Austin* and *One 1958 Plymouth Sedan*, the Court criticized the

government's attempt to characterize lawfully possessed property as "instruments." *Ibid.* In the same manner, Petitioner's attempt to find a similarity between this case and *One Lot Emerald Cut Stones* must fail.

4. The correctness or erroneousness of the decision below is not meant to be the central focus of the Court's exercise of its certiorari jurisdiction. As Justice Rhenquist said for the Court in *Ross v. Moffitt*, 471 U.S. 600, 616-617 (1974), "[this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Respondent contends that the decision below was correct. Regardless of the correctness of erroneousness of the decision, Petitioner's claim of error is not grounds for review.

In its claim that this case was erroneously decided, Petitioner encourages this Court to grant certiorari because "nothing in this case suggests that forfeiture of the undeclared cash was an excessive fine." This argument, supported by a line of unrelated narcotics forfeiture cases, *see United States v. Elder*, 90 F.3d 1110 (6th Cir.), *cert. denied*, 117 S. Ct. 529 (1996); *United States v. Milbrand*, 53 F.3d 841 (2nd Cir. 1995), *cert. denied*, 116 S. Ct. 1284 (1996); *United States v. Wild*, 47 F.3d 669 (4th Cir.), *cert. denied*, 116 S. Ct. 128 (1995); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1995), inappropriately encourages this Court to engage in a factual excessive fines analysis which was properly performed in the district court. Indeed, even Justice Wallace, who disagreed with the conclusion that the currency was not an instrumentality, found that the district court had not erred in its ruling.

Also in its argument that the Ninth Circuit committed error, Petitioner claims the court of appeals made no distinction between currency that has a legitimate source and cash that is linked to illegal activity. This claim is incorrect. It is apparent

from the court of appeals' ruling that the legitimacy of the currency was the most important aspect of the "instrumentality" analysis. Thus, there is no merit to Petitioner's concern that illegitimate currency may escape seizure.

In essence, the government seeks for its own coffers currency which was legitimately obtained, lawfully possessed, and intended for a lawful purpose. This Court should view the government's efforts with great scrutiny and care. Whether characterized as a forfeiture or fine, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; [whereas] fines are a source of revenue. . . . [i]t makes more sense to scrutinize governmental action more closely when the State stands to benefit." *Harmeline v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J., plurality opinion.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
9 1997
OFFICE OF THE CLERK

No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Our petition challenges the court of appeals' holding that 18 U.S.C. 982(a)(1) is a per se violation of the Excessive Fines Clause insofar as it requires criminal forfeiture of currency that is not reported in violation of 31 U.S.C. 5316. Respondent first contends (Br. in Opp. 6-7) that the court of appeals did not so hold. Instead, he argues, the court confined its ruling to cases in which unreported money is lawfully possessed and intended for a lawful purpose. The court of appeals, however, did not limit its holding in the manner suggested by respondent. The court's statement of its holding is unequivocal:

> Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is

> mere failure to report pursuant to 31 U.S.C. § 5316. In such situations, there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines Clause.

Pet. App. 8a. Respondent does not identify any language in the court's opinion that qualifies its holding that a forfeiture under Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses.

Judge Wallace, concurring in the judgment, had no difficulty perceiving the breadth of the majority's ruling. In explaining his disagreement with the majority, he stated that the court "strikes down a portion of 18 U.S.C. § 982(a)(1)," Pet. App. 10a, that "even if a district court finds that money was illegally acquired, the majority does not allow forfeiture," *id.* at 12a, and that "even if a defendant's failure to report is combined with another violation of United States law (and the other law does not independently allow forfeiture), the majority still would not allow forfeiture," *ibid.* Respondent thus errs in seeking to confine the scope of the court of appeals' ruling to particular applications of Section 982.*

2. Respondent next contends (Br. in Opp. 7-8) that the decision below does not conflict with the Second

---

* Even if the court had limited its ruling in the manner suggested by respondent, it would not reduce the need for this Court's review. Congress enacted a statute that requires mandatory forfeiture of unreported funds, regardless of whether the funds were lawfully possessed or intended for a lawful purpose. The ruling proposed by respondent would nullify that Act of Congress on constitutional grounds and replace it with one that required the government to establish that the funds were either unlawfully possessed or intended for an unlawful purpose.

Circuit's decision in *United States* v. *United States Currency in the Amount of $145,139*, 18 F.3d 73, cert. denied, 513 U.S. 815 (1994), because the Second Circuit focused on the double jeopardy issue in that case, and because its holding that unreported currency is an instrumentality of a Section 5316 offense appears in the double jeopardy, rather than the excessive fine, part of its opinion. The existence of a conflict in the circuits, however, does not depend on the focus or structure of an opinion. The relevant inquiry is whether one court's *holding* conflicts with that of another. Here, the Ninth Circuit has held that the forfeiture of unreported currency is per se an excessive fine, Pet. App. 8a-9a, while the Second Circuit has held that it is not, *United States Currency in the Amount of $145,139*, 18 F.3d. at 76. Those holdings squarely conflict.

Nor does it matter that the Second Circuit did not specifically discuss the application of its ruling to cases in which the currency was legitimately possessed and intended for a legitimate purpose (Br. in Opp. 8). As already discussed, the Ninth Circuit did not rely on that factor in its analysis; its holding applies to all unreported currency. At the same time, the Second Circuit did not confine its ruling to cases in which the currency is unlawfully possessed or intended for an unlawful use; its ruling also applies to all unreported currency. 18 F.3d at 76. Thus, in the Ninth Circuit, the government may not obtain the forfeiture of any unreported currency, while in the Second Circuit, the government may obtain the forfeiture of the entire sum. That conflict in the circuits warrants resolution by this Court.

3. Respondent also contends (Br. in Opp. 9-10) that the decision below does not conflict with *One Lot*

Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972) (per curiam), because that case resolved a double jeopardy claim, not an excessive fine claim. But as we explain in our petition (Pet. 13), *Austin* v. *United States*, 509 U.S. 602, 621, 622 n.14 (1993), makes clear that remedial forfeitures of the kind approved in *One Lot Emerald Cut Stones* do not constitute excessive fines. *One Lot Emerald Cut Stones* is therefore relevant in resolving an excessive fine claim as well as a double jeopardy claim.

Respondent contends (Br. in Opp. 10) that *One Lot Emerald Cut Stones* is distinguishable because the gems seized in that case were contraband, while undeclared currency is not. But this Court did not characterize the gems seized in *One Lot Emerald Cut Stones* as contraband. And as we explain in our petition (Pet. 13-15), the gems seized in *One Lot Emerald Cut Stones* are analogous to undeclared currency in every relevant sense: Both are generally lawful to possess; both become subject to forfeiture when an attempt is made to smuggle them into or out of the country; both are the central instrumentality of that offense; and the forfeiture of both is fully justified as a remedial measure. Thus, just as the forfeiture of smuggled gems is not an excessive fine, so the forfeiture of undeclared currency is not an excessive fine.

4. Finally, petitioner contends (Br. in Opp. 10) that review is unwarranted, because (he asserts) our petition requests the Court to determine whether, on the facts of this case, the forfeiture is excessive. Our petition, however, does not seek review of a factbound excessiveness question. Rather, the petition seeks review of the court of appeals' legal analysis. In particular, we argue, the court committed two fundamental legal errors: First, the court of appeals erred in holding that undeclared currency is not an instrumentality of a Section 5316 offense (Pet. 12-15); and second, it erred in holding that criminal forfeiture of undeclared currency is per se excessive unless it can be characterized as an instrumentality of the offense (Pet. 15-16). Those legal errors led the court of appeals to conclude not only that the forfeiture in this case was constitutionally excessive, but also that the forfeiture of even one dollar of undeclared currency would be constitutionally excessive. Pet. App. 9a.

* * * * *

For the foregoing reasons, and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997

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QUESTION PRESENTED

Whether 18 U.S.C. 982(a)(1) violates the Excessive Fines Clause of the Eighth Amendment insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without the filing of the currency report required by 31 U.S.C. 5316.

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H.R. Rep. No. 975, 91st Cong., 2d Sess. (1970) 3, 21, 25

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1487

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 84 F.3d 334.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. A petition for rehearing was denied on November 18, 1996. On February 7, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1997. A petition for a writ of certiorari was filed on March 18, 1997, and it was granted on May 27, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included in an appendix to the brief.

STATEMENT

On his plea of guilty in the United States District Court for the Central District of California, respondent was convicted on one count of willfully failing to report the transportation of $357,144 out of the United States, in violation of 31 U.S.C. 5316(a) and 5322(a). The district court held that, although 18 U.S.C. 982(a)(1) required the court to order respondent to forfeit the unreported currency to the United States, the imposition of a forfeiture greater than $15,000 would violate the Excessive Fines Clause of the Eighth Amendment. The court thus ordered a forfeiture in the latter amount. Pet. App. 16a-19a. The court of appeals affirmed, holding that the forfeiture of any of the unreported currency as a sanction for a reporting violation is unconstitutional. *Id.* at 1a-14a.

1. a. With certain limited exceptions, Title 31, Section 5316 requires a person who "transports, is about to transport, or has transported, monetary instruments of more than $10,000" outside the country to file a report with the Secretary of the Treasury. The report (Customs Form 4790) asks for the person's name and address, the kind of currency transported, the value of the currency, and, if the person is acting on someone else's behalf, the name and address of that person. Congress imposed the currency reporting requirement after concluding that such a report has "a high degree of usefulness in criminal,

tax, or regulatory investigations or proceedings." 31 U.S.C. 5311.

The House Report to the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, discusses the circumstances that led to the enactment of Section 5316. The Report notes that "[f]or years American criminal elements ha[d] been taking or sending currency out of the United States either in furtherance of a criminal activity or for deposit in a secret foreign haven." H.R. Rep. No. 975, 91st Cong., 2d Sess. 13 (1970). The money had come from "criminal activities, skim money from gambling operations and the like." *Ibid.* In addition, "many Americans ha[d] used couriers to send money to foreign jurisdictions with secrecy laws for the purpose of evading taxes and otherwise hiding assets." *Ibid.*

Those secretive activities produced "debilitating effects * * * on Americans and on the American economy." H.R. Rep. No. 975, *supra*, at 12. "[H]undreds of millions in tax revenues [were] lost." *Ibid.* "[U]nwanted credit" was "pumped into our markets." *Ibid.* Corporate officers "enriched themselves" and "endangered the financial soundness of their companies to the detriment of their stockholders." *Ibid.* And "[c]riminals engaged in illegal gambling, skimming, and narcotics traffic [were] operating their financial affairs with an impunity that approach[ed] statutory exemption." *Ibid.*

Investigators of those activities were "in an impossible position." H.R. Rep. No. 975, *supra*, at 12. They were required to "subject themselves to a time consuming and ofttimes fruitless foreign legal process," and "[e]ven when procedural obstacles [were] overcome, the foreign jurisdictions rigidly enforce[d] their secrecy laws against their own domestic

institutions and employees." *Ibid.* By enacting Section 5316 and other requirements, Congress sought to close that "serious investigative loophole." *Id.* at 13.

b. To ensure compliance with Section 5316's reporting requirement, Congress devised a series of complementary civil and criminal enforcement mechanisms. On the civil side, Congress provided that, "[i]f a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government." 31 U.S.C. 5317(c). Congress also authorized civil forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section [5316], or any property traceable to such property." *Ibid.* (referring to violation of 31 U.S.C. 5324(b), which in turn incorporates a failure to file a report required by Section 5316). In addition, "[t]he Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316." 31 U.S.C. 5321(a)(2). The amount of the fine "may not be more than the amount of the monetary instrument for which the report was required," and "is reduced by an amount forfeited under section 5317." *Ibid.*

On the criminal side, a person who "willfully" violates the currency reporting requirement is guilty of a felony, and "shall be fined not more than $250,000, or imprisoned for not more than five years, or both." 31 U.S.C. 5322(a). Under 18 U.S.C. 982(a)(1), the provi-

sion at issue here, "[t]he court, in imposing sentence on a person convicted of an offense in violation of [the currency reporting requirement], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Property "involved in [the] offense" includes the money that is not reported, any commissions or fees paid to the person transporting the money, and property used to facilitate the offense. See 134 Cong. Rec. S17,365 (daily ed. Nov. 10, 1988) (interpreting the language in 18 U.S.C. 982(a)(1) before Section 5316 was added to the list of offenses leading to criminal forfeiture); 136 Cong. Rec. 11,197-11,198 (1990) (explaining that amendment adding Section 5316 offenses to the list of offenses subject to criminal forfeiture is intended to parallel the criminal forfeiture sanctions for the other offenses listed in 18 U.S.C. 982(a)(1)).

Under the statutory scheme, a district court does not have discretion to reduce the amount of a civil or criminal forfeiture. Congress entrusted to the Secretary of the Treasury and to the Attorney General the responsibility to decide the circumstances under which such a reduction would be warranted. The Secretary of the Treasury has authority to "remit any part of a [civil] forfeiture," 31 U.S.C. 5321(c), and the Attorney General is authorized to "grant petitions for mitigation or remission of [criminal] forfeiture." 21 U.S.C. 853(i)(1) (applicable to forfeitures under 18 U.S.C. 982(a)(1) by virtue of 18 U.S.C. 982(b)(1)).

2. a. On June 9, 1994, respondent Hosep Bajakajian was in Los Angeles International Airport, waiting to board a flight to Syria. With the assistance of a canine, U.S. Customs inspectors located approxi-

mately $140,000 concealed in respondent's checked luggage and another $90,000 in a false bottom of one of his bags. An inspector then approached respondent and his family in the airport and informed them that they were required to report all money in their possession and in their luggage that exceeded $10,000. Respondent told the inspector that he had $8,000 and that his wife had $7,000. Pet. App. 2a-3a; Plea Agreement 7 (Oct. 27, 1994) (Stipulated Statement of Facts).

Customs inspectors eventually discovered $357,144 concealed by respondent and his wife. After respondent was advised of his rights, he admitted to Customs agents that he knowingly and willfully failed to report the cash. Pet. App. 3a.

b. On July 8, 1994, respondent was indicted in the United States District Court for the Central District of California. He was charged with one count of failing to report the export of currency in excess of $10,000, in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a); one count of making a false material statement to the United States Customs Service, in violation of 18 U.S.C. 1001; and one count of criminal forfeiture of the undeclared funds under 18 U.S.C. 982(a)(1). Pet. App. 3a.

On October 27, 1994, respondent pleaded guilty to the exporting unreported currency count and agreed to a bench trial on the forfeiture count. The government agreed to dismiss the false statement count at sentencing. Pet. App. 3a.

At the bench trial on the forfeiture count, the parties proffered evidence that respondent had given three different explanations about the source of the funds he had concealed. Respondent first told Customs agents that a friend named Abe Ajemian had lent him approximately $200,000, that approximately

$28,000 was his own, and that various friends and relatives had lent him the remaining $130,000. Gov't Trial Mem. 5 (filed Nov. 28, 1994). Ajemian told Customs agents, however, that he had not lent respondent $200,000. *Id.* at 5-6. Respondent then claimed that Saeed Faroutan lent him $170,000. *Id.* at 6. Faroutan, however, told Customs agents that he had made no such loan and that respondent had asked him to lie about it. *Ibid.* Respondent finally claimed that Ajemian and six others had provided $185,000 and that the rest belonged to him. Def. Trial Mem. 2-3 (filed Dec. 15, 1994). Respondent also claimed that he owed money to his cousin and that he had intended to travel to Cyprus to deliver the money to his cousin. *Id.* at 3.

Following the bench trial, the district court found that the entire $357,144 discovered by Customs agents was involved in respondent's offense, and that those funds were therefore subject to forfeiture under 18 U.S.C. 982(a)(1). Pet. App. 16a. At sentencing, however, the court ordered respondent to forfeit only $15,000, ruling that forfeiture of more than that amount would be "grossly disproportionate" to respondent's culpability and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.* at 17a-18a. The court stated:

> I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal. I do believe that, even though it's a somewhat suspicious and confused story, documented in the poorest way, and replete with past misrepresentation, that the funds were * * * borrowed funds.
>
> * * * * *

> And I think the evidence has developed that [respondent's] state of mind * * * grew out of * * * distrust for the Government. * * * So, the amount of forfeiture will be modest, and will be very very minor, because in truth, and, in fact, I think none should be forfeited.

Ibid. The court also sentenced respondent to three years' probation and fined him $5,000. *Id.* at 18a-19a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court applied a two-part test under which a forfeiture is constitutional under the Excessive Fines Clause only if "(1) the property forfeited is an 'instrumentality' of the crime committed, and (2) the value of the property is proportional to the culpability of the owner." *Id.* at 5a. The court held that the money concealed by respondent failed to satisfy the instrumentality component of that test. The court reasoned that money involved in a violation of Section 5316 can never be an instrumentality of that offense, because "[t]he crime is the withholding of information * * * not the possession or the transportation of the money." *Id.* at 6a.

The court concluded that its holding did not conflict with this Court's decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), which, in rejecting a double jeopardy claim, upheld as remedial the civil forfeiture of gems that had not been declared when the owner brought them into the country. Pet. App. 7a-8a. The court believed that the smuggled gems in *One Lot Emerald Cut Stones* were "contraband," but that the money involved in a currency reporting violation is not. *Id.* at 8a. The court further stated that the "key difference," is that "a violation of § 5316 merely deprives

the government of information, whereas the smuggling of goods across the border deprives the government of revenue." *Ibid.*

Having concluded that a forfeiture constitutes an excessive fine unless the forfeited property was an instrumentality of an offense, and that money involved in a violation of Section 5316 is not an instrumentality of that offense, the court held that "[f]orfeiture of any amount" of respondent's undeclared money "would be unconstitutionally excessive under * * * [the] Excessive Fines Clause." Pet. App. 9a. The court affirmed the judgment of the district court ordering the forfeiture of $15,000 only because respondent had failed to cross appeal and therefore could not challenge the district court's judgment. *Id.* at 9a-10a.

Judge Wallace concurred in the judgment of affirmance, but disagreed with the majority's Eighth Amendment analysis. Pet. App. 10a-14a. Judge Wallace concluded that money involved in a violation of Section 5316 is an instrumentality of that offense, because "without the currency, there can be no offense." *Id.* at 13a. In ruling otherwise, Judge Wallace emphasized, "the majority strikes down a portion of 18 U.S.C. 982(a)(1), thereby unduly limiting the government's forfeiture powers." *Id.* at 10a. Judge Wallace nonetheless voted to affirm the district court's judgment, because he concluded that the district court did not commit clear error in finding that a $15,000 forfeiture was proportional to respondent's culpability. *Id.* at 13a-14a.

The government's petition for rehearing and suggestion for rehearing en banc were denied. Judge Wallace voted to grant both the petition for rehearing

and the suggestion for rehearing en banc. Pet. App. 15a.

SUMMARY OF ARGUMENT

Respondent was convicted and sentenced for the felony of willfully failing to file a required currency report as he was about to leave the United States with $357,144 in cash. The court of appeals concluded that the forfeiture of that undeclared cash—or of any cash involved in a failure-to-report violation—constitutes an excessive fine, in violation of the Eighth Amendment. That holding is incorrect. The criminal forfeiture of currency that is not declared as required by federal law is not an "excessive fine" within the meaning of the Eighth Amendment.

A. Throughout this nation's history, Congress has provided for forfeiture as a sanction for the improper use of property in the commission of offenses. The First Congress provided for enforcement of the customs laws by authorizing the forfeiture of property imported without proper declaration. Later forfeiture laws reached a variety of forms of property used or involved in a criminal offense. This Court has consistently rejected constitutional challenges to such forfeitures, and the long history of such statutes provides strong support for the proposition that they are not "excessive" fines.

The forfeiture of such instrumentalities of crime (*i.e.*, property used or involved in the commission of an offense) is a proportionate sanction because, apart from any punitive purpose such forfeitures might serve, they serve important remedial aims. They encourage property owners to take care that their property does not become involved in crime; they prevent further use of the property in crime; and they

impose an economic sanction that renders crime less profitable. In view of those purposes, the forfeiture of the instrumentalities of crime, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value.

The forfeiture of the undeclared currency involved in a reporting offense is justified on that basis. The currency is an indispensable instrumentality of the failure-to-report offense. The offense requires proof that cash is being transported (or is about to be transported); without the involvement of the cash, there is no offense. Forfeiture of the cash also serves the traditional remedial goals of instrumentality forfeitures. The remedy prevents the use of unreported cash to conceal or further criminal activity, and it encourages travelers to report information that is critical in the investigation of domestic and international crime. Finally, the sanction is precisely tailored to the magnitude of the violation; the greater the amount of cash that is transported without declaration, the greater the potential harm posed by the unlawful activity.

B. The forfeiture of the undeclared cash as part of a criminal sentence for a failure-to-report offense is also justified as serving punitive purposes.

Forfeiture of the property used by a criminal in carrying out his offense is an inherently fitting penalty for a serious crime. The defendant, in such a case, has effectively set his own "fine" by electing to employ his property in furthering a criminal venture. No further analysis of a defendant's culpability (or of

the value of his property) is needed to uphold the proportionality of such a criminal forfeiture.

Even if criminal forfeiture were applied to property that is not significantly tied to the offense, the sanction would not automatically be excessive. The question in such a case would be the same as in an excessive fines challenge to a monetary sanction: whether the amount of the financial penalty is excessive in relation to the seriousness of the offense. The answer to that question, as with other Eighth Amendment questions, must give deference to the legislature's assessment of the seriousness of the crime and appropriate penalties.

Here, Congress's judgment to impose criminal forfeiture on the undeclared cash does not transgress constitutional bounds. The circulation of unreported cash throughout the world facilitates money laundering, tax evasion, and other illicit conduct. To address such serious harms, Congress has made it a felony for a person willfully to fail to report cash that is about to be exported, and has authorized a sentence of up to five years' imprisonment and a $250,000 fine. Including in the sentence the forfeiture of the very cash involved in the offense is not an excessive fine. Far from being excessively punitive, such a forfeiture is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed.

ARGUMENT

THE CRIMINAL FORFEITURE OF CURRENCY THAT IS ABOUT TO BE TRANSPORTED OUT OF THE UNITED STATES WITHOUT THE FILING OF A REQUIRED CURRENCY REPORT IS NOT AN EXCESSIVE FINE

The Eighth Amendment to the Constitution prohibits the imposition of "excessive fines." This Court has held that both *in personam* criminal forfeitures and civil *in rem* forfeitures are "fines" within the meaning of the Excessive Fines Clause. *Alexander* v. *United States*, 509 U.S. 544, 558 (1993) (*in personam* criminal forfeitures); *Austin* v. *United States*, 509 U.S. 602, 618-622 (1993) (civil *in rem* forfeitures). The Court has not, however, established a standard for determining when such forfeitures become constitutionally "excessive." *Alexander*, 509 U.S. at 559 (remanding for consideration of that issue); *Austin*, 509 U.S. at 622-623 (same).

The court of appeals in this case held that a forfeiture is constitutionally excessive unless it satisfies two conditions: (1) the property forfeited must be an instrumentality of the crime committed, *i.e.* the forfeited property must have a sufficient relationship to the illegal activity; and (2) the forfeiture must not be grossly disproportionate to the culpability of the owner. Pet. App. 5a; *United States* v. *6830 Little Canyon Road*, 59 F.3d 974, 982 (9th Cir. 1995). The Ninth Circuit applies that same test to both criminal and civil forfeitures. Pet. App. 5a (criminal); *6830 Little Canyon Road*, 59 F.3d at 982 (civil).

In our view, compliance with the Eighth Amendment does not require satisfaction of both conditions

set forth by the court of appeals. Instead, as a general matter, a criminal forfeiture complies with the Eighth Amendment as long as it satisfies either. Under the correct constitutional standard, the forfeiture of the currency involved in this case is not excessive.[1]

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[1] While the courts of appeals have differed somewhat in the way they have framed the legal analysis, they have almost uniformly rejected excessive fines challenges to forfeitures of property involved in federal criminal offenses. See *United States* v. *Tencer*, 107 F.3d 1120, 1135 n.7 (5th Cir. 1997); *United States* v. *One Parcel Property*, 106 F.3d 336, 338-339 (10th Cir. 1997) (per curiam); *United States* v. *829 Calle De Madero*, 100 F.3d 734, 736-739 (10th Cir. 1996); *United States* v. *One Parcel Property Located at Lot 85*, 100 F.3d 740, 744 (10th Cir. 1996), cert. denied, No. 96-1736, 1997 WL 220039 (June 2, 1997); *United States* v. *Elder*, 90 F.3d 1110, 1132-1133 (6th Cir.), cert. denied, 117 S. Ct. 529 (1996), 117 S. Ct. 993 (1997); *United States* v. *One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053, 1057-1058 (8th Cir. 1996); *United States* v. *All Right, Title and Interest in Real Property and Appurtenances*, 77 F.3d 648, 658-659 (2d Cir.), cert. denied, 117 S. Ct. 67 (1996); *United States* v. *427 and 429 Hall Street*, 74 F.3d 1165, 1170-1173 (11th Cir. 1996); *United States* v. *11869 Westshore Drive*, 70 F.3d 923, 926-930 (6th Cir. 1995), cert. denied, 117 S. Ct. 57 (1996); *United States* v. *Buchanan*, 70 F.3d 818, 830-831 n.12 (5th Cir.), cert. denied, 116 S. Ct. 1340-1341, 1366 (1996); *United States* v. *Bieri*, 68 F.3d 232, 235-238 (8th Cir. 1995), cert. denied, 116 S. Ct. 1876 (1996); *United States* v. *Milbrand*, 58 F.3d 841, 845-848 (2d Cir. 1995), cert. denied, 116 S. Ct. 1284 (1996); *United States* v. *429 South Main Street*, 52 F.3d 1416, 1421-1422 (6th Cir. 1995); *United States* v. *Plescia*, 48 F.3d 1452, 1462 (7th Cir.), cert. denied, 116 S. Ct. 114, 329, 351, 556 (1995); *United States* v. *Chandler*, 36 F.3d 358, 362-366 (4th Cir. 1994), cert. denied, 514 U.S. 1082 (1995); *United States* v. *Myers*, 21 F.3d 826, 830-831 (8th Cir. 1994), cert. denied, 513 U.S. 1086 (1995). But see, *e.g.*, *United States* v. *18755 North Bay Road*, 13 F.3d 1493, 1498-1499 (11th Cir. 1994).

A. The Criminal Forfeiture Of Unreported Currency Is Not Excessive Because Unreported Currency Is An Essential Instrumentality Of An Unreported Currency-Transportation Offense

1. a. Since the First Congress, this nation's laws have provided for the forfeiture of property involved in certain offenses. The First Congress enacted customs laws that provided for the forfeiture of goods entered by false statements, goods unloaded at night or without a permit, concealed goods on which duties had not been paid, and relanded goods entitled to a drawback. Act of July 31, 1789, ch. 5, §§ 12, 23, 24, 34, 1 Stat. 39, 43, 46. The early customs laws also provided for the forfeiture of vessels involved in customs offenses. §§ 12, 40, 1 Stat. 39, 49. Under the early customs statutes, forfeiture did not depend on the value of the property or the culpability of the property owner; the property's involvement in the offense was sufficient.

"The historical importance of the enactment of [those] customs statute[s] by the same Congress which proposed the [Eighth] Amendment is * * * manifest." *United States* v. *Ramsey*, 431 U.S. 606, 616-617 (1977) (applying that analysis in upholding border searches under the Fourth Amendment). The necessary premise of the early customs laws is that the forfeiture of property involved in an offense is not an excessive fine. Those laws and the view of the Eighth Amendment they reflect are "contemporaneous and weighty evidence of [the Eighth Amendment's] true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); see also *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790-791 (1983).

b. Congress has subsequently enacted numerous laws authorizing civil forfeiture of property involved in criminal offenses, and "contemporary federal * * * forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974). In a long line of decisions, this Court has rejected Due Process and Double Jeopardy Clause challenges to the validity of such forfeitures. The Court has upheld the forfeiture of a variety of forms of property involved in offenses, including: vessels involved in piracy (*The Palmyra*, 25 U.S. (12 Wheat.) 1, 13 (1827); *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233-234 (1844)); a distillery and associated real and personal property when alcohol taxes were not paid (*Dobbins's Distillery* v. *United States*, 96 U.S. 395, 400-401 (1878)); an automobile used to transport liquor on which taxes had not been paid (*J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 508, 510-512 (1921)); undeclared imported gems (*One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972)); unlicensed firearms (*United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364-366 (1984)); and real property used for growing marijuana (*United States* v. *Ursery*, 116 S. Ct. 2135, 2138-2139 (1996)).

As was true with the first customs laws, the forfeitures in later statutes were "fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant." *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment); see, *e.g.*, *The Palmyra*, 25 U.S. (12 Wheat.) at 14 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing"); *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) at 233 ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."); *Dobbins's Distillery*, 96 U.S. at 401 ("the offence * * * is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner"); *Goldsmith-Grant Co.*, 254 U.S. at 513 ("It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."). Congress's 200-year practice of providing for the forfeiture of instrumentalities without a separate inquiry into the value of the property involved in the offense or the culpability of the owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936).[2]

[2] The early forfeiture cases do not employ the term "instrumentality" to describe the property involved in the offense. That term, however, fairly characterizes the range of property whose forfeiture is authorized because of the use or involvement of the property in a direct and substantial way in the offense (*i.e.*, conveyances used to transport contraband, real property used to carry out unlawful activity, property imported without proper declaration). See *United States* v. *92 Buena Vista Avenue*, 507 U.S. 111, 119-121 (1993) (plurality opinion).

c. The cases cited above, though addressing Due Process and Double Jeopardy claims, illuminate why Congress has never viewed instrumentality forfeitures as excessive fines. As those cases explain, the forfeiture of property involved in an offense, "while perhaps having certain punitive aspects, serves important nonpunitive goals." *Ursery*, 116 S. Ct. at 2148. Such a forfeiture both "encourages property owners to take care in managing their property," *ibid.*, and "prevent[s] further illicit use of the [property]," *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000 (1996). See also *Calero-Toledo*, 416 U.S. at 687 (forfeiture of wrongfully used property "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable"); *89 Firearms*, 465 U.S. at 363 (forfeiture of unlicensed firearms discourages unregulated commerce and removes firearms intended for use outside regulated channels). Those "broad remedial aims," *Ursery*, 116 S. Ct. at 2142, are served by a forfeiture of property involved in an offense, regardless of the value of the property or the culpability of the owner.[3]

Because instrumentality forfeitures serve important remedial goals in a direct and material way, Congress has always viewed them as fair and appropriate sanctions, not "excessive fines." That considered judgment by Congress is reasonable and

[3] Forfeitures of instrumentalities of an offense can also serve as a reasonable form of liquidated damages to defray the government's costs of enforcement and the societal harms created by the activity in which the property is involved. See *One Lot Emerald Cut Stones*, 409 U.S. at 237. That purpose is implicated regardless of the culpability of the owner.

therefore entitled to deference. Cf. *Harmelin* v. *Michigan*, 501 U.S. 957, 998-999 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

2. For the reasons discussed above—the persuasive force of the views of the First Congress, the weight of 200 years of congressional practice, and the reasonableness of Congress's judgment that instrumentality forfeitures represent appropriate remedial sanctions—traditional instrumentality forfeitures are not "excessive fines" within the meaning of the Eighth Amendment. Accordingly, in such cases, there is ordinarily no requirement of a separate inquiry into the value of the property or the culpability of the owner.[4]

a. The forfeiture of unreported currency involved in an offense is justifiable on an instrumentality theory. Section 5316 makes it unlawful to transport currency of more than $10,000 outside of the United States without filing a report with the Secretary of the Treasury. 31 U.S.C. 5316. A person who "willfully" violates that requirement commits a criminal offense, 31 U.S.C. 5322(a), and the undeclared cur-

[4] It is, however, appropriate to inquire into the degree of relationship that the property bears to the offense. An incidental or remote relationship between the property and the offense would not accord with the traditional applications of forfeiture doctrine described above. Such a relationship would therefore justify further analysis under the Excessive Fines Clause. See, *e.g.*, *Bennis*, 116 S. Ct. at 1000 (forfeiture of an ocean liner because of the activities of one of its passengers); *Austin*, 509 U.S. at 627-628 (Scalia, J., concurring in part and concurring in the judgment) (forfeiture of a building in which an isolated drug deal happens to occur). Absent a sufficient connection between the property and the offense as traditionally understood, the property may not fairly be described as an "instrumentality" of the offense.

rency is subject to mandatory forfeiture, 18 U.S.C. 982(a)(1). Such a forfeiture satisfies constitutional requirements, because the undeclared currency is an essential instrumentality of the offense. The currency that is transported in a reporting violation is "the very *sine qua non* of the crime." *United States* v. *United States Currency in the Amount of $145,139*, 18 F.3d 73, 75 (2d Cir.), cert. denied, 513 U.S. 815 (1994). For "without the currency, there can be no offense." Pet. App. 13a (Wallace, J., concurring in the judgment). Thus, unreported cash that is about to be exported does not merely facilitate a violation of law; there would be no violation at all without the exportation (or attempted exportation) of the cash. Accordingly, as the Second Circuit explained in *United States Currency in the Amount of $145,139*:

> Clearly, it is much more accurate to describe the currency as the means by which the crime was committed than it would be to so describe a house from which drugs had been sold or an automobile in which they had been transported. If, as we have held, a house can be considered an instrumentality of the crime, * * * we would be blinking reality if we held that the money in the instant case was any less an instrumentality.

18 F.3d at 75.

b. As with traditional instrumentality forfeitures, the forfeiture of undeclared currency also serves important remedial purposes. The government has an overriding sovereign interest in controlling what property leaves and enters this country. See *Ramsey*, 431 U.S. at 616-619. Reporting requirements are an essential means of serving that vital interest. The reporting requirement at issue here serves a particularly important function in deterring and investigating crime. Before the reporting requirement was imposed, criminal enterprises had been able to send money secretly out of the country either in furtherance of their criminal activities or for deposit in countries with secrecy laws, and thus were able to operate their financial affairs "with an impunity that approache[d] statutory exemption." H.R. Rep. No. 975, *supra*, at 12. Many other persons had sent money to foreign jurisdictions with secrecy laws for the purpose of evading taxes, leading to hundreds of millions of dollars in lost tax revenues. *Id.* at 12-13. And some corporate officials had enriched themselves at the expense of their companies and stockholders. *Id.* at 12. The reporting requirement not only deters illicit movements of cash, it also gives the government valuable information to investigate and detect criminal activities associated with that cash. By "singl[ing] out transactions found to have the greatest potential" for "circumvent[ing] the enforcement of the laws of the United States," see *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63 (1974), the reporting requirement provides the government with information that has "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311.

The forfeiture of undeclared currency plays an important role in supporting the remedial purposes of the reporting requirement. It both encourages persons to inform the government that they are transporting more than $10,000 in cash outside the country and prevents such money from being used in circumvention of requirements in the future. A forfeiture of all the money involved in a reporting violation is also precisely tailored to the remedial purposes of

the reporting requirement. The dangers created by money that is secretly exported increase as the amount of money secretly exported increases: The greater the amount of money that is laundered or hidden overseas, the greater the potential harm to the people and the economy of this country. Thus, it is a fair and reasonable remedy to subject to forfeiture the cash that a person attempts secretly and unlawfully to export.

c. The forfeiture of currency involved in an undeclared currency violation also has deep historical roots. As noted above, since the First Congress, this nation's laws have provided for the forfeiture of goods involved in customs offenses. Those laws reflect the view that when property is imported without compliance with declaration and reporting requirements, it is a reasonable remedy to confiscate the property unlawfully imported.

In *One Lot Emerald Cut Stones*, *supra*, this Court held, in rejecting a claim under the Double Jeopardy Clause, that the civil forfeiture of such undeclared goods serves legitimate remedial ends. In that case, a defendant who entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring was acquitted of criminal smuggling charges. 409 U.S. at 232-233. Following the acquittal, the government instituted a civil forfeiture proceeding against the stones and ring under a statute that authorized forfeiture of any article not included in a declaration prior to inspection. *Id.* at 233 & n.2. This Court held that the Double Jeopardy Clause did not bar the forfeiture proceeding, noting that the civil forfeiture served remedial rather than punitive purposes. *Id.* at 235-237. The Court explained that the forfeiture of undeclared property

"prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." *Id.* at 237. "[S]uch purposes," the Court noted, "characterize remedial rather than punitive sanctions." *Ibid.*

This Court has made clear that the remedial characterization of such customs forfeitures applies equally under the Excessive Fines Clause. In *Austin*, the Court cited *One Lot Emerald Cut Stones* as an example of a remedial forfeiture, stating that "forfeitures of goods involved in customs violations" are justified as a remedial sanction and therefore are not excessive fines. *Austin*, 509 U.S. at 621.

The forfeiture of money involved in a reporting violation bears important similarities to the forfeiture of undeclared goods. Both actions reflect the government's sovereign interest in controlling what property leaves and enters this country. Both also encourage the reporting of information required for an important regulatory function: when goods are declared, the information determines their exposure to duties and their admissibility into the United States; when currency is reported, the information may be used to investigate and detect circumvention of our drug, tax, and other laws. Both kinds of forfeitures prevent circumvention of requirements in the future, and both "provide[] a reasonable form of liquidated damages for violation of the inspection provisions and serve[] to reimburse the Government for investigation and enforcement expenses." *One Lot Emerald Cut Stones*, 409 U.S. at 237. Finally, like undeclared goods, undeclared currency is the

very item hidden from the government and is therefore the central instrumentality of the offense. The forfeiture of undeclared currency therefore comes within the tradition in this country of remedial customs forfeitures.

d. The court of appeals sought to distinguish forfeiture of undeclared currency from forfeiture of undeclared goods on the ground that Section 5316(a) does not make unlawful "the illegal possession, transportation, or smuggling of dutiable items," but only "the failure to provide information." Pet. App. 7a-8a. That description of the offense is incomplete. The offense is not merely the failure to report, but the willful failure to file a report when "transport[ing] monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1); 5322(a). The essence of the offense is therefore smuggling money out of the country, not simply failing to provide information.

The court of appeals also believed that undeclared goods may be characterized as contraband, while undeclared currency cannot be. Pet. App. 8a. Undeclared currency and undeclared goods, however, cannot be distinguished on that ground. Both are generally lawful to possess; both become subject to seizure and forfeiture when an attempt is made to smuggle them unlawfully across the border. The Ninth Circuit found it significant that the failure to declare goods deprives the government of revenue in the form of duties, while the failure to report currency information deprives the government only of information. Pet. App. 8a. The harm to the government from reporting violations, however, though not always quantifiable, is considerable. Money is often

secretly exported in order to evade the payment of taxes. Such violations can lead to an incalculable loss in tax revenue. And, the economic power of much criminal activity depends on money laundering that secretly moves cash in and out of the country. Tracing the flow of currency plays a vital role in attacking global criminal activity. Given the major drain on the economy of such illicit financial activities, crimes that allow unreported dollars to circulate throughout the world inflict significant harm. Thus, money that is secretly exported out of this country produces "debilitating effects * * * on Americans and the American economy." H.R. Rep. No. 975, *supra*, at 12.

3. The currency in this case was subject to forfeiture in a criminal *in personam* proceeding rather than a civil *in rem* proceeding. That circumstance, however, does not alter the conclusion that the currency is an instrumentality whose forfeiture is justifiable as a reasonable remedial measure. Criminal sanctions are usually intended primarily to inflict punishment. But "nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of civil form of proceeding." *Helvering* v. *Mitchell*, 303 U.S. 391, 402 n.6 (1938). For example, an order requiring a person convicted of a crime to provide restitution to his victim serves the remedial goal of making the victim whole, regardless of whether the order is imposed in a civil or a criminal proceeding. See 18 U.S.C. 3663. Similarly, whether imposed in a civil or criminal proceeding, a forfeiture of the proceeds of an offense serves the remedial purpose "of ensuring that persons do not profit from their illegal acts," *Ursery*, 116 S. Ct. at 2149; *id.* at 2152 (Stevens, J., concurring in

the judgment in part and dissenting in part). The same reasoning applies to forfeitures of instrumentalities: Such forfeitures can serve the same remedial goals in criminal proceedings that they do in civil *in rem* proceedings.

The text of Section 982(a)(1) shows that Congress intended to rely on remedial as well as punitive goals when it mandated the criminal forfeiture of the currency at issue here. Section 982(a)(1) provides that, in imposing sentence for a reporting violation, the court shall order forfeiture of "any property, real or personal, involved in such offense." 18 U.S.C. 982(a)(1). As a general matter, property "involved in [the] offense" is a shorthand description for the kind of property historically subject to forfeiture in a civil *in rem* proceeding. See 134 Cong. Rec. S17,365 (daily ed. Nov. 10, 1988) (property involved in the offense includes the money involved in the offense, any commissions or fees paid to the person transporting the money, and property used to facilitate the offense). Indeed, the provision authorizing civil *in rem* forfeiture for reporting violations uses the same "involved in" language to identify the kind of property subject to forfeiture. 31 U.S.C. 5317(c) (referring to violation of 31 U.S.C. 5324(b), which in turn incorporates a failure to file a report required by Section 5316). By generally limiting the property subject to forfeiture to property that has traditionally been subject to forfeiture in civil *in rem* proceedings, Congress manifested its intent to further, among other things, traditional remedial ends.

In sum, the currency involved in an undeclared currency violation is subject to forfeiture as an instrumentality of the offense. Such a forfeiture is justifiable by remedial purposes, regardless of

whether the forfeiture occurs in a civil or a criminal proceeding. In view of the remedial goals served by this traditional form of forfeiture, the forfeiture of the unreported currency in this case is not an excessive fine.

B. The Criminal Forfeiture Of Unreported Currency Is Not Excessive Because Such A Forfeiture Is Commensurate With The Seriousness Of An Unreported Currency Offense

Quite apart from the instrumentality analysis described above, the forfeiture of unreported currency as a *criminal* sanction for a failure to report transportation of that currency is not an excessive fine. Although criminal forfeitures often may serve remedial purposes, they need not be justified solely in those terms. Such forfeitures may also be independently justified as punishment, so long as the punishment is not excessive in relation to the offense. Given respondent's decision to involve his money in a crime and the serious nature of the offense, the forfeiture of the currency involved in this case is not a disproportionate punishment.

1. a. The background of the Excessive Fines Clause shows that its principal concern was with the imposition of excessive monetary fines for punitive purposes. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266-267 (1989). The Excessive Fines Clause was modelled on a provision of the Virginia Declaration of Rights, which in turn was based on a provision of the English Bill of Rights. *Id.* at 266. The English version was intended to curb the excesses of English judges under the reign of James II. *Id.* at 267. During the reigns of the Stuarts, the King's judges imposed heavy fines on

the King's enemies, and later, the use of fines became even more excessive and partisan, forcing some opponents of the King to remain in prison because they could not pay the huge monetary penalties assessed. *Ibid.* Given that background of the Eighth Amendment, when Congress authorizes the imposition of a monetary fine solely as punishment, the most relevant constitutional inquiry is whether the value of the fine is excessive when compared to the seriousness of the offense. *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment).

The criminal forfeiture of property that the defendant has used or involved in a serious offense is a distinctive "fine," and will virtually always constitute a proportionate punishment. That is because the defendant, through his own actions, has put his property in the service of crime, and thereby has set the size of his own financial penalty. Confiscation of that property as part of his sentence is inherently proportionate to the violation.

b. But even if criminal forfeiture were authorized of property that had not been substantially or significantly devoted to the commission of the offense, such a "fine" would not automatically be excessive. When such a forfeiture is imposed as an *in personam* punishment for a criminal offense, it is "no different, for Eighth Amendment purposes, from a traditional [monetary] 'fine.'" *Alexander*, 509 U.S. at 558. Such a punitive forfeiture operates as an "in-kind" assessment. *Austin*, 509 U.S. at 624 (Scalia, J., concurring in part and concurring in the judgment). The appropriate inquiry would then be whether the value of the property is excessive when compared to the seriousness of the offense. *Id.* at 627; see *Alexander*, 509 U.S. at 558. Because the property in such a forfeiture

may be seen as equivalent to an ordinary monetary fine, there is no constitutional requirement that it have any particular relationship to the offense.

In such a case, a court has a limited role in determining whether a punitive forfeiture is constitutionally excessive. In this context, as in applying the Cruel and Unusual Punishment Clause, the Eighth Amendment "does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Instead, it forbids only those fines that are "grossly disproportionate" to the seriousness of the offense. *Solem* v. *Helm*, 463 U.S. 277, 288 (1983). In conducting that inquiry, substantial deference must be given to Congress' judgment concerning the seriousness of the offense. *Harmelin*, 501 U.S. at 998-999 (Kennedy, J., concurring in part and concurring in the judgment). A court "should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.'" *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541-542 (1989).

2. a. Under the correct standard, the criminal forfeiture mandated in this case is not excessively punitive. First, the property subjected to forfeiture is the very money that respondent involved in his offense. Such a punishment thus fairly fits the crime without further inquiry into the value of the forfeited property. Second, to the extent that the value of the property bears on the excessiveness question, the "fine" here is proportionate.

Forfeiture of the undeclared cash is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed. *United States* v. *United States Currency in the Amount of $145,139*, 803 F. Supp. 592, 600 (E.D.N.Y. 1992), aff'd, 18 F.3d 73 (2d Cir.), cert. denied, 513 U.S. 815 (1994). And the offense itself is a serious one. Respondent was convicted of a willful violation of the reporting requirment. Respondent's conviction rests on an admission that he knew that it was unlawful to export more than $10,000 without filing a report and decided not to file such a report anyway. Congress authorized significant penalties for such a willful violation. In addition to mandating criminal forfeiture of the currency, Congress authorized as additional punishment a $250,000 fine and/or a five-year term of imprisonment. 31 U.S.C. 5322(a). Those authorized penalties are the best indication of Congress's view of the seriousness of the offense. See *Blanton*, 489 U.S. at 541, 542 ("In fixing the maximum penalty for a crime, a legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense'" and the maximum period of incarceration is "the most powerful indication" of that judgment).

Congress's judgment concerning the seriousness of a willful violation of the reporting requirement is well-founded. As previously discussed, Congress was aware that the secret export of large amounts of cash is often associated with money laundering, tax evasion, and other serious offenses. Congress reasonably determined that a reporting requirement was essential to deter and detect such activity and that willful violations of that requirement should result in strict punishment. See *United States* v. *O'Banion*,

943 F.2d 1422, 1432-1433 (5th Cir. 1991) (regulation of currency that crosses our borders is a "serious matter," and claim that classification of a reporting offense as a felony violates the Cruel and Unusual Punishment Clause is not "plausible").

In light of the seriousness of a willful violation of the reporting requirement, the forfeiture of the very money involved in that offense cannot be viewed as a "grossly disproportionate" punishment. In general, while "[p]enalties such as * * * a fine may engender 'a significant infringement of personal freedom,' * * * they cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542. If respondent were sentenced to a term of imprisonment, he could not seriously claim that his punishment was grossly disproportionate to the offense. See *O'Banion*, 943 F.2d at 1422. Because the forfeiture of the money concealed in the offense is a less severe penalty, any claim that it is excessively punitive is even less persuasive.

b. Nothing in the facts of this case suggests that forfeiture of the undeclared currency would be an excessive fine. Respondent violated the reporting requirement after a customs officer approached him and told him that he was required to file a report if he was intending to export more than $10,000 in currency. Respondent then deliberately lied about the amount of money in his possession, claiming that he had less than $10,000 when he was actually planning to export $347,144. After customs inspectors discovered the currency concealed by respondent and his wife, respondent admitted to agents that he knowingly and willfully failed to report the cash. Pet. App. 3a; Plea Agreement 7 (Oct. 27, 1994) (Stipulated Statement of Facts). Respondent then lied about

the source of the funds, providing three different explanations about it. Gov't Trial Mem. 5-6 (filed Nov. 28, 1994); Def. Trial Mem. 2-3 (filed Dec. 15, 1994). For that conduct, respondent was sentenced to three years' probation and fined $5,000. Particularly in light of the range of possible sentences that Congress contemplated, it cannot be excessively punitive to add to respondent's sentence a forfeiture of the very money he concealed.

c. That conclusion is not affected by the district court's finding that "even though it's a somewhat suspicious and confused story, documented in the poorest way, and replete with past misrepresentation," respondent obtained the funds from a legitimate source and intended to use them for a legitimate purpose. Pet. App. 17a-18a. Congress viewed willful violations of the reporting requirement as a serious offense, without regard to whether the government can prove that the defendant was violating or intending to violate other laws at the same time. Rather than viewing the presence of other violations as a necessary element of the offense, Congress regarded such additional violations as grounds for doubling the maximum penalties. In such cases, Congress authorized a fine of "not more than $500,000, imprison[ment] for not more than 10 years, or both." 31 U.S.C. 5322(b).

Congress's decision to mandate forfeiture for a willful reporting violation, whether or not additional violations are proven, was entirely reasonable. Deliberately violating an important criminal law is itself a serious matter, regardless of whether the dangers that the law is designed to prevent materialize. Moreover, if Congress had mandated forfeiture only in cases in which other violations of the law

could be proven, there would have been far less incentive for persons to comply with the reporting requirement in the first place. Those planning to export money for money laundering or tax evasion purposes would be far more willing to attempt to smuggle the cash if they knew that the money was not at risk unless the government could prove that their clandestine movement of the money was designed to further other violations of the law. Acceptance of respondent's asserted defense would therefore significantly undermine Congress's purposes.

d. It is also relevant to the constitutional inquiry in this case that Congress has left room for mitigation of a forfeiture in appropriate cases. Congress has authorized the Attorney General to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section." 21 U.S.C. 853(i)(1) (applicable to forfeitures under 18 U.S.C. 982(a)(1) by reference to 18 U.S.C. 982(b)(1)). Congress could reasonably decide that the Attorney General is in the best position to decide when the mitigation of criminal forfeiture would not compromise legitimate law enforcement interests.

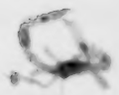
e. In sum, as long as Congress has made a reasonable judgment that the punishment fits the crime, judicial inquiry is at an end. *Harmelin*, 501 U.S. at 998-999, 1001 (Kennedy, J., concurring in part and concurring in the judgment); *Solem* 463 U.S. at 303. Congress's determination that forfeiture of undeclared funds is a fitting punishment for a willful

reporting violation, leaving to the Attorney General the power to decide when mitigation is warranted, is eminently reasonable and satisfies constitutional requirements.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for the imposition of a sentence that requires respondent to forfeit to the government the currency involved in his offense.

Respectfully submitted.



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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 5316 of Title 31, United States Code, provides in relevant part:

> (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> > (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
> >
> > > (A) from a place in the United States to or through a place outside the United States;
> >
> > * * *
>
> (b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. * * *

Section 5317(c) of Title 31, United States Code, provides in relevant part:

> (c) If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5324(b), or any property traceable to such property, may be seized and forfeited to the United States Government. * * *

Section 5321(a)(2) of Title 31, United States Code, provides:

> (2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited under section 5317(b) of this title.

Section 5322(a) of Title 31, United States Code, provides:

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324) shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Section 5324(b)(1) of Title 31, United States Code, provides:

> (b) International monetary instrument transactions.—No person shall, for the purpose of evading the reporting requirements of section 5316—
>
> > (1) fail to file a report required by section 5316, or cause or attempt to cause a person to fail to file such a report;

Section 982(a)(1) of Title 18, United States Code, provides in part:

> The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. * * *

(6)

Supreme Court, U.S.
FILED
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No. 96-1487

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

vs.

HOSEP KRIKOR BAJAKAJIAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether forfeiture of lawfully possessed currency under 18 U.S.C. § 982(a)(1) is unconstitutional under the Excessive Fines Clause of the Eighth Amendment where the crime committed is a mere failure to report transportation of currency, in violation of 31 U.S.C. § 5316.

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OPINION BELOW

The opinion of the Court of Appeals (Petition's App., 1a-14a) is reported at 84 F.3d 334.

STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth with sufficient particularity and accuracy in the brief for the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved is set forth with sufficient particularity and accuracy in the appendix to the brief for the United States.

STATEMENT OF THE CASE

A. The Reporting Requirement Statute

Section 5316 of Title 31, United States Code, provides that an individual is required to file a report when leaving the United States with $10,000 or more. Failure to provide the report exposes that individual to criminal sanctions, pursuant to Section 5322(a) of Title 31, United States Code, in the form of not more than five years imprisonment, a fine of not more than $250,000 and, under Section 982(a)(1) of Title 18, United States Code forfeiture of "any property involved . . . in such offense." Section 5317(c) of Title 31, United States Code also provides for civil forfeiture of any property involved in a failure to report offense.

B. The Offense

On June 9, 1994, Respondent and his wife attempted to

board an Alitalia Airway flight leaving Los Angeles International Airport and destined for Lanarca, Syria via Rome Italy. Unbeknownst to Respondent, his flight was the subject of an examination by a Customs Service canine trained to detect the presence of currency. The canine alighted on appellee's luggage and a search of the luggage revealed $230,192.

A Customs Service Inspector approached Respondent as he and his wife were preparing to board their flight. The inspector explained the currency reporting requirements to Respondent and his wife and asked whether they had in their possession currency in excess of $10,000. Respondent informed the inspector that he had $8,000 in his possession and his wife, $7,000. A search of appellee and his wife further revealed an additional $127,012. After an additional search of Respondent's luggage, the total amount of currency found in his possession was $357,144. The currency was seized and appellee was taken into custody. Respondent was ultimately charged, in a three count Indictment, with 31 U.S.C. § 5316(a)(1)(A), 31 U.S.C. § 5322(a); 18 U.S.C. § 1001; and 18 U.S.C. § 982(a)(1).

In an interview with customs agents after Respondent's arrest for the failure to declare his possession of currency in excess of $10,000, Respondent gave an explanation as to the source of the seized currency. Subsequently, Respondent provided another explanation for the source of the seized funds and, prior to sentencing, provided the Government and court with documentation supporting a third explanation.

C. The Plea

On October 27, 1994, Respondent moved to change his plea of not guilty and entered a guilty plea to count one of the Indictment which charged defendant with 31 U.S.C. §§ 5316(a)(1)(A), 5322(a). Pursuant to the plea agreement, the

Government agreed to dismiss count two at the time of sentencing. The parties also stipulated to having count three, the forfeiture count, tried to the court as a bench trial.

On December 20, 1994, the District Court found that the Government had satisfied its burden that the seized funds were subject to forfeiture and the court invited the parties to submit briefs regarding the amount of forfeiture which was to be decided at sentencing.

D. Sentencing and Forfeiture

At the time of sentencing, the District Court entertained argument regarding what amount of the seized currency should be forfeited, among other sentencing issues unrelated to this Petition.

In reference to the seized currency, the United States Probation Department found that the subject funds were legally obtained and for a lawful purpose. The Government also conceded that Respondent had a legitimate debt in Syria and acknowledged that it had no evidence that the $357,144 are the proceeds of an unlawful activity. However, the Government urged the District Court to apply a proportionality analysis with the burden placed upon Respondent. The government also argued that forfeiture in the case is purely remedial but that, if forfeiture was found violative of the Eighth Amendment, the court may mitigate the amount to be forfeited. The Government then requested the entire amount be forfeited.

Respondent submitted a trial memorandum and supplemental memorandum of law re: forfeiture and judicial discretion under the Eighth Amendment. In these briefs, Respondent explained and provided documentation for the sources of the $357,144, described the purpose for the currency, admitted his crime, and apologized for his transgression.

Respondent, however, urged the court to exercise its discretion and mitigate the mandatory forfeiture provisions of 18 U.S.C. § 982(a)(1).

At the sentencing hearing, the District Court stated,

> I do believe that the United States Currency was in the suitcase and in the carry on luggage for reasons that were not illegal. I do believe that, even though it's a somewhat suspicious and confused story, documented in the poorest way, replete with past misrepresentations, that the funds were — the funds of the defendant, and borrowed funds.
>
> I do believe . . . that the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation. . . .

Additionally, the court found, "This wasn't drug money. This wasn't gambling money. This wasn't stolen money. This wasn't money that was being laundered for any reason. That's been proven."

The District Court reached this conclusion after hearing from both the Government and Respondent. The District Court ruled,

> First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not, under the circumstances attain — order the

> forfeiture of the entire $357,000 plus dollars. That would be grossly disproportionate to the offense in questions. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.
>
> . . . So the amount of forfeiture will be modest, and will be very minor, because in truth, and in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

Thus, appellee was sentenced to three years formal probation, fined $5,000, and ordered to forfeit $15,000 of the seized currency.

E. The Ninth Circuit Appeal

The Government appealed the District Court's ruling, which the Ninth Circuit affirmed. Focusing on the fact that the currency was lawfully acquired and possessed, the court applied a two prong Excessive Fines Test to the forfeiture in question. Pursuant to the Ninth Circuit's Excessive Fines test, forfeiture is constitutional "if (1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner."

The court held that the currency at issue, lawfully acquired and possessed, was not an instrumentality of the offense and, in so holding, ruled that "[f]orfeiture of currency is unconstitutional when the crime to which forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316."

The court, relying on *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995), refused to find

the seized currency an instrumentality because lawfully acquired and possessed currency lacks "that necessarily close relationship to the crime simply because it has not been reported."

> "Simply put the existence of the currency does not make it an instrumentality. For example, we would not characterize lawfully earned income as instrumentality simply because a taxpayer failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an 'instrumentality' to the breaking point."

Id. at 1167-68, referring also to *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime.)

The court further explained "the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed." Thus, unlike smuggled contraband or a vehicle used to transport contraband, the unreported currency is not an instrumentality of the crime and forfeiture of any amount is violative of the Eighth Amendment's Excessive Fines Clause.

Judge Wallace concurred in the court's result but disagreed with the court's conclusion that the currency was not an instrumentality. Although Justice Wallace felt that the currency was an instrumentality of the offense, he did not believe that the District Court's finding's were clearly erroneous. As such, he would affirm the $15,000 forfeiture.

The Government petitioned for rehearing, with a Suggestion for Rehearing En Banc. This request was denied.

SUMMARY OF ARGUMENT

Forfeiture of Respondent's currency for his failure to report offense violates the Eighth Amendment's proscription against excessive fines. Although Respondent does not contend that forfeiture for a failure to report offense will always be unconstitutional, where the owner of the property can demonstrate that the property sought to be forfeited was possessed lawfully and intended for a lawful purpose, forfeiture should be impermissible.

In its brief, the Government accurately describes this nation's lengthy history of forfeiture, as well as the importance of currency reporting requirements. Respondent does not contest this history, nor does he minimize the importance of the reporting requirement in this nation's efforts to fight crime. A description of this history and importance, however, cannot resolve the issue before this Court. The government fails to recognize the historical importance of the Eighth Amendment's Excessive Fines Clause and those circumstances where the Eighth Amendment dictates a more precise analysis of whether property should be subject to forfeiture.

To determine whether Respondent's currency, or any property, real or personal, should be forfeited to the Government, Respondent contends a two-part analysis should be performed. Initially, the property subject to forfeiture must be deemed an instrumentality of crime and, if such a relationship between the property and offense is found, the property sought to be forfeited must be proportionate to the crime committed.

To be considered an instrumentality of crime for the purpose of forfeiture, the property in question must bear a sufficient nexus to the offense. This nexus must warrant the conclusion that the property was a substantial and meaningful

instrumentality in the commission of the offense. For a determination that the forfeiture is proportionate to the offense, the forfeiture must be commensurate, under the totality of circumstances, with the culpability of the offender.

The main focus of either prong of the instrumentality — proportionality analysis must be on the source and intended use of the property. If the property is found to be lawfully possessed and intended for a lawful purpose, the property cannot be deemed an instrumentality, nor can forfeiture of the property be considered proportionate to the crime committed.

The Government seeks to uphold the forfeiture in this case by arguing that forfeitures of instrumentalities of crime are not excessive. The Government justifies this assertion by claiming that forfeiture of the currency, as an instrumentality, serves important non-punitive, remedial goals and thus, forfeiture is proportionate. This view, however, inappropriately attempts to expand the definition of what constitutes an instrumentality of crime and improperly ignores the punitive aspects of the forfeiture, which punish without any correlation to any damage inflicted by Respondent.

The Government also seeks to uphold the forfeiture here on the basis that the forfeiture of Respondent's currency, as punishment, is proportionate to the offense. This argument, which rests on the theory that Respondent has set his own fine in the amount of undeclared currency and that Congress intended a penalty in the extent of the undeclared currency, must also fail. Such a view fails to address the various factors which must be taken into account when making any proportionality enquiry.

Finally, forfeiture of Respondent's legitimate currency for his failure to report the currency as he was about to leave the country offends our fundamental notions of fairness and equity.

Respondent demonstrated that he lawfully acquired the unreported currency and that the currency was intended for a lawful purpose. The Government never presented any evidence to the contrary. That currency should not, therefore, be forfeited for his violation of a statute aimed at the investigation into and deterrence of narcotics and organized crime activities. The Excessive Fines Clause of the Eighth Amendment must prevent such a result.

ARGUMENT

I.

IN ORDER TO DETERMINE WHETHER A SPECIFIC FORFEITURE VIOLATES THE EIGHTH AMENDMENT A TWO-PART INSTRUMENTALITY-PROPORTIONALITY ANALYSIS SHOULD BE REQUIRED.

The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The view that the Eight Amendment should place limits on the powers of the Government is not new. Indeed, the primary focus of the Eighth Amendment was "the potential for governmental abuse of its 'prosecutorial' power. . . ." *Browning Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) The Eighth Amendment's concern for overzealous prosecutorial conduct led this Court to its recent rulings regarding the applicability of the Excessive Fines Clause of the Eighth Amendment to forfeitures.

This Court has held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures, whether considered *in rem* or *in personam*. *Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993). In these rulings, however, the question how to apply the Eighth

Amendment to a particular case was left to the lower courts to decide. Implicit, however, in *Austin*, is the consideration of various factors, not just the relationship between the property the offense. *Austin*, at 622, n.15.

In the wake of *Austin* and *Alexander*, numerous Circuits have had the opportunity to establish various tests to determine whether a forfeiture constitutes an excessive fine under the Eighth Amendment. The majority of the Circuits which have addressed the question perform an analysis which purports to balance the severity of the fine, *i.e.*, the forfeiture, with the seriousness of the offense and the culpability of the owner. *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, Cal.*, 59 F.3d 974, 985-86 (9th Cir. 1995); *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1284, 134 L. Ed. 2d 228 (1996); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (adopting a three part instrumentality test which "considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder"), *cert. denied*, __ U.S. __, 115 S. Ct. 1792, 131 L. Ed. 2d 721 (1995); *see also United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1876, 135 L. Ed. 172 (1996); *United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 876 (3d Cir. 1994) (leaving the question open but suggesting that both the nexus between the property and the offense and the relationship between the value of the forfeited property and the severity of the offense are relevant.); *United States v. 829 Calle de Madero, Chaparral, Otero County, New Mexico*, 100 F.3d 734, 738 (10th Cir. 1996); *Unites States v. One Parcel Real Property Located at 427 & 429 Hall Street*, 74 F.3d 1165, 1170-1172 (11th Cir. 1996). Yet, it is apparent from the cases that no single test has been accepted.

Although no single test has been accepted, an analysis which considers various factors such as that performed in a majority of the Circuits is more appropriate than the Government's insistence that a instrumentality approach is all that is required. The Government's initial position appears to be that if certain property is "used or involved in the commission of an offense", forfeiture of that property will always comport with the Eighth Amendment as a remedial measure. Brief for the United States, p. 10. Respondent agrees with the Government that the forfeiture of contraband as an instrumentality under the Government's analysis serves important remedial, non-punitive goals. *Austin*, at 621, referring to *United States v. One Assortment of 89 Firearms*, 465 U.S. 364 (1984).

This view, however, does not acknowledge the close scrutiny required when the government stands to benefit, *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion.), nor does it recognize the punitive aspects of the forfeiture of Respondent's currency or this Court's criticism of the Government's attempts at expansive definitions of what can be considered an instrumentality. *Austin*, at 621. Even the instrumentality approach suggested in *Austin* provides a more intricate analysis than that proposed by the Government. Austin at 628, (Scalia, J., concurring). Indeed, the Government's assertion that instrumentality forfeitures are not excessive ignores the issue before this Court: what is an instrumentality for the purpose of forfeiture?

A. The Instrumentality Test

In Respondent's view of the correct analysis, property sought to be forfeited must be considered an instrumentality of the crime; there must be a sufficient nexus between the property and the crime. There appears to be no dispute that it is "appropriate to inquire into the degree of relationship that the

property bears to the offense" and that an "incidental or remote relationship between the property [sought to be forfeited] and the offense would not accord with the traditional applications of forfeiture doctrines." Brief for the United States, at p. 19 n.4, citing *Bennis v. Michigan*, 116 S. Ct. 994, 1000 (1996) and *Austin*, 509 U.S. at 627-628. In this apparent agreement, the Government implicitly concedes that which Respondent suggests.

Again, various courts have established different tests to establish whether property sought to be forfeited can be considered an instrumentality of crime. In its excessive fines analysis, the Second Circuit employs a multi-factor approach which entails an instrumentality analysis, focusing on, "the relationship between the offense, including whether the property in the offense was (a) important to the success of the illegal activity, (b) deliberate or planned or merely incidental and fortuitous, and (c) temporally or spatially extensive. . . ." *United States v. Milbrand*, 53 F.3d at 847-848 (1995). In measuring the strength and extent of the nexus between the property and offense, the Fourth Circuit has suggested that the following factors should be taken into account:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense.

United States v. Chandler, *supra*, 36 F.3d 358, 365, cited with approval in *United States v. Certain Real Property Located at 11869 Westshore Drive*, 70 F.3d 923 (6th Cir. 1995.)

Although the Ninth Circuit failed to explicitly address the specific factors which is considered in its instrumentality analysis, its analysis and conclusion are persuasive. The court focused on the lawfulness of the property subject to forfeiture, Pet. App. 6a, and on the nature of the crime committed, *id.* at 8(a), before it determined that the connection between the property and crime was not sufficiently close to support forfeiture.

The reasoning and logic behind these approaches is sound as each attempts to resolve the issue of whether the property sought to be forfeited has a close enough relationship to the offense. Unless the property itself can be characterized as contraband, forfeiture under the historical fiction that the property itself is tainted is unpersuasive. Under such circumstances, it is only the use to which the property is put which renders it, in some manner, culpable. Thus, a mere statement that the property was "used in" or "involved in" the offense is insufficient and imprecise.

B. The Proportionality Test

Contrary to the Government's assertions, performance of an instrumentality test alone is insufficient to determine whether a forfeiture can withstand scrutiny under the Eighth Amendment. Such a view, which takes into account solely a factual enquiry

into whether property is somehow causally connected to crime, fails to address the extent of the fine imposed on the owner of the property. A complete Eighth Amendment analysis also requires an examination of whether the intended forfeiture is proportionate to the offense committed.

While no list of various factors will be sufficient to weigh the proportionality of a specific forfeiture, an examination of whether a forfeiture is proportionate to the offense is a logical approach to an excessive fines analysis. *See United States v. 9638 Chicago Heights*, 27 F.3d 327, 330-331 (8th Cir. 1994) (expressing dissatisfaction with the application of a pure instrumentality test because such a test fails to take into account the value of the property in monetary terms and the effect the forfeiture would have on innocent residents); *see also United States v. Myers*, 21 F.3d 826, 831 (8th Cir. 1994) (affirming the district court's determination that the forfeiture of defendant's farm although harsh, was not disproportionate to the serious crime for which the defendant was convicted).

Emanating from this Court's holding in *Solem v. Helm*, 463 U.S. 277, 290-92, the proportionality test also has been treated differently in various courts. "Proportionality analysis compares the value of the property to a variety of factors which may include the culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm to the community." *United States v. 11869 Westshore Drive*, 70 F.3d 923, 927, referring to *United States v. 6380 Little Canyon Road*, 59 F.3d 974, 983-985 (9th Cir. 1995). Indeed, an inclusion of a proportionality test "would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality." *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1399 n.23 (citations omitted).

In determining whether the forfeiture is proportionate to

the crime, it is also relevant to examine the legislative history of the statute criminalizing the conduct involved. *See United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1291, (N.D. Ga. 1995), referring to *United States v. One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493 (11th Cir. 1994).

II.

AN APPLICATION OF THE APPROPRIATE ANALYSIS TO THE FORFEITURE OF RESPONDENT'S CURRENCY DEMONSTRATES THAT FORFEITURE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Using the appropriate standard, forfeiture of Respondent's currency, for his failure to report that currency, violates the Excessive Fines Clause of the Eighth Amendment. The currency in question consisted of Respondent's savings, combined with that which he borrowed from friends and family. The currency was to be used to repay a lawful debt to another family member. These contentions, which Respondent presented to the Government and District Court, were uncontested. As such, this currency cannot be found to be an instrumentality of a failure to report offense, nor can forfeiture be held proportionate to Respondent's crime.

A. Respondent's Currency Was Not An Instrumentality Of The Crime Of Failing To Report.

This Court has cast doubt on expansive definitions of what can qualify as an instrumentality of crime. *See Austin v. United States*, 509 U.S. at 621, relying on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1995). In both *Austin* and *One 1958 Plymouth Sedan*, this Court contrasted forfeitures of

contraband against forfeitures of items which were legally possessed but used in the commission of crime. In both cases, this Court also criticized the Government's attempts to characterize property as "instruments." An examination of Respondent's currency, under the instrumentality analysis suggested herein, establishes that the Ninth Circuit was correct when it ruled that Respondent's legitimate currency was not an instrumentality of the failure to report offense.

Respondent's failure to declare the currency was deliberate. The deliberation, however, must be tempered by the fact that Respondent hid the currency out of fear and distrust, not to prevent discovery of booty obtained from illegal activities. The property was not important to the success of any criminal activity. Respondent stood to gain nothing through his failure to report. Certainly, the District Court found that Respondent intended to use the currency for lawful purposes. There was no indication that there was any intention to use the currency in the commission of any other criminal offense. The currency was not contraband, nor was it a smuggled, dutiable item. Furthermore, it was not illegal to take the money out of the country.

Even though the crime could not have been committed but for the existence of the currency, this factor alone should not be dispositive. This factor alone is insufficient to conclude that the currency is an instrumentality of Respondent's failure to provide information.

> Simply put, the existence of currency as a precondition does not make it an instrumentality. For example, we would not characterize lawfully earned income an instrumentality forfeitable as such simply because a taxpayer wilfully failed to report

> that income in his tax return in violation of the tax code. The government would have is stretch the fiction of an "instrumentality" to the breaking point.

Pet. App. 7a.

The Government's reliance on *United States Currency in the Amount of $145,139*, 803 F. Supp. 592 (E.D.N.Y. 1992), *aff'd*, 18 F.3d 73 (2d Cir.), *cert. denied*, 513 U.S. 815 (1994), to establish a circuit-split and to argue Respondent's currency constitutes an instrumentality of a failure to report offense, does not completely address the issue. After the decision in *$145,139*, the Second Circuit established a hybrid, multi-factor excessive fines test. *See All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 501 (2d Cir. 1995) and *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). Given *Milbrand*'s more detailed consideration of the relationship between the property and the offense, *$145,139* cannot be deemed dispositive, even in the Second Circuit.

The Government's reliance on *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) is also misplaced. In *One Lot Emerald Cut Stones*, this Court addressed the issue of whether the Double Jeopardy Clause will bar the civil forfeiture of smuggled goods after an acquittal on the underlying criminal prosecution for customs violations. *Id.* at 235-237. This case presents none of those issues. The sole issue here is whether the forfeiture of legitimate, unreported currency violates the Eighth Amendment's proscription against excessive fines.

The property sought to be forfeited in *One Lot Emerald Cut Stones* was forbidden merchandise and forfeiture served a remedial, non-punitive purpose. *Id.* at 237. The forfeiture of legitimate money involved in undeclared currency violations is

readily distinguishable from the forfeiture of the contraband gems in *One Lot Emerald Cut Stones*. The currency at issue in § 5316 violations is presumed to be lawfully possessed and is not subject to duty; it is not illegal to take the currency out of the country. Such was not the case with the smuggled gems in *One Lot Emerald Cut Stones*.

While the forfeiture of the gems in *One Lot Emerald Cut Stones* constituted the removal of contraband items, such a characterization cannot be made with regard to Respondent's currency. Even though forfeiture of unreported currency may possess, in some applications, the remedial goals of removing drug money, laundered money, or gambling money from those who wish to utilize it for their illicit trades, there are no persuasive arguments that forfeiture of Respondent's currency serves these remedial aims. Forfeiture of Respondent's currency is "a penalty which ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Austin* at 621, citing *United States v. Ward*, 448 U.S. 242, 254 (1980).

B. Forfeiture Of Any Of The Seized Currency Is Disproportionate To The Crime Respondent Committed.

In the District Court, Respondent admitted his violation of failing to report his possession of the currency, but described his crime as less onerous than others. Respondent explained the legitimate sources of and lawful purpose for the seized currency. Additionally, respondent described the context in which he was able to obtain such a large amount of currency, even though little documentation existed. Respondent also explained his falsehoods as fostered by fear, panic, and cultural uncertainty.

With respect to the severity of forfeiture, Respondent explained that the majority of funds were borrowed, and that

the borrowed funds, as well as Respondent's own savings were intended to repay a lawful obligation to family overseas. Respondent contended that if the currency were to be forfeited, not only would he still possess his debt overseas, but he would also continue to be indebted to those from whom he borrowed some of the currency. Hardship to Respondent, thus, is demonstrably severe and, as submitted in the District Court, reaches that draconian level the Eighth Amendment seeks to prevent.

On the other side of the proportionality analysis, an examination of the gravity of the offense demonstrates that, even though the currency crimes have an important purpose, *United States v. $145,139.00*, 803 F. Supp. 592, the gravity of the currency crime at issue here is not as morally contemptible as those cited by the Government for the proposition that forfeiture of the entire amount of seized currency is warranted. Brief for the United States, 14 n.1 (citing numerous narcotics cases in which forfeiture was upheld).

Respondent has never disputed the legitimate and important deterrence and punishment goals the reporting requirements seek to obtain. House Report to the Bank Secretary Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114; H.R. Rep. No. 975, 91st Cong., 2d Sess. 13 (1970). The purpose of the reporting statute, however, is to require reports of foreign transactions where such reports would be helpful. Senate Committee on Banking and Currency, S. Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). Yet, an examination of the crime committed by Respondent is not that which the reporting requirement seeks to prevent. The gravamen of the crime is not the failure to provide information, but the failure to provide currency information in the commission of narcotics or organized crime activities. The currency statutes "are primarily directed at persons who make a lucrative career in the illicit drug trade and organized crime" and the penalties

serve "to deter and punish such activities." H.R. Rep. No. 98-130, 98th Cong., 2d Sess. 1984.

Respondent's crime does not encompass that which the statute seeks to prevent. The currency was not part of any lucrative career, in narcotics or any other criminal conduct. The currency was legitimately earned and borrowed. The currency was intended to be used to repay a legitimate business debt. No taint, other than Respondent's failure to report, exists. Thus, while the statute Respondent violated is serious, the particular crime Respondent committed is not.

An application of these facts to the appropriate proportionality review demonstrates that forfeiture of the currency in question is grossly disproportionate to the offense and, hence, forfeiture is unconstitutional. Whichever factors are chosen for a proportionality analysis the same conclusion is warranted. Even though Respondent willfully committed the offense, Respondent stood to reap no gain, victimize no-one, and was in possession of nothing illegal. "Quite simply, [Respondent] possessed no culpable intent and had nothing to gain through his failure to report the seized currency." Respondent's Trial Memorandum, at p. 8.

The Government argues that forfeiture of Respondent's currency is perfectly proportionate to the offense because, in essence, Respondent has set his own fine, *i.e.*, the more the amount one fails to report, the more the fine. This claim of direct proportionality must fail. There is no correlation between the amount undeclared and the culpability of the owner; there is no determination of whether the undeclared currency was intended for any illegitimate purposes; and there is no analysis of whether the unreported currency was obtained through illegal activities.

To support forfeiture of Respondent's currency as lawful, the Government relies on Respondent's pre-plea fabrications. Brief for the United States, 31-32. Yet, forfeiture of all of Respondent's currency would still result, in the Government's view, even had Respondent been forthright the moment the currency was discovered. It is disingenuous for the Government to rely on Respondent's fabrication to support forfeiture of currency which they seek under all circumstances.

The Government also contends that, in light of the potential statutory fines which Congress authorized, the forfeiture of the currency cannot be said to be disproportionate. Any measure of proportionality, however, should not be based on a hypothetical amount of a potential fine Respondent could have received. This Court should "reject the government's invitation to traffic in hypothetical. The government wishes the court to use as a yardstick for measuring the seriousness of the offense at issue a federal fine that . . . could have been received. . . ." *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1290; *United States v. Real Property Located at Zamirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994); *see also United States v. One Parcel of Property Located at Shelly's Riverside Heights Lot X*, 851 F. Supp. 633, 638 (M.D. Pa. 1994) (rejecting comparison of applicable federal fine with value of subject property). Even though Congress may have intended a potential fine for a given offense, proportionality must be based on the facts of a specific case, not conjecture, speculation, or hypotheticals.

III.

FORFEITURE OF PROPERTY WHICH IS LAWFULLY POSSESSED AND INTENDED FOR A LAWFUL PURPOSE SHOULD NEVER SURVIVE UNDER THE SCRUTINY OF AN EIGHTH AMENDMENT CHALLENGE.

The case before this Court, unlike any of those presented in the Brief for the United States, presents a remarkably unique set of circumstances. Never before has a court held that currency, lawfully possessed and intended for a lawful purpose, should be forfeited to the Government because the owner of the property made a mistake in judgment which lacked a criminally culpable intent. In all the cases the Government submitted to this Court, the property sought to be forfeited was involved in illegal activities such as narcotics trafficking, organized crime, or smuggling of dutiable items. Nowhere can the Government point to a case which presents circumstances such as those here.

Respondent contends that there must be a vehicle for legitimate property owners to obtain a return of their lawfully earned property. Whether such a determination is made under an instrumentality or proportionality approach, the Eighth Amendment must serve as the means by which legitimate property may be returned to its owner.

The Government should not under any circumstances be engaged in forfeiting its citizen's legitimate property. While no dispute exists where the powerful tool of forfeiture is used for the illicit trade in narcotics or for the proceeds of organized crime, the Government's forfeiture procedures in this case result in Governmental tyranny that this country's founders sought to prevent.

In this case, the Government seeks for its own coffers currency which was legitimately obtained, lawfully possessed,

and intended for a lawful purpose. This Court should view the Government's efforts with great scrutiny and care. Whether characterized as a forfeiture or fine, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; [whereas] fines are a source of revenue . . . [i]t makes more sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion.)

Whether considered under an instrumentality approach, a proportionality approach, or a hybrid of the two, forfeiture should never be applied when an individual can successfully demonstrate his property was lawfully possessed and intended for a lawful purpose. Respondent met this burden in the courts below, and his currency must be returned.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the currency seized in this case by the United States should be returned to Respondent.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 2 1997
CLERK

No. 96-1487

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

HOSEP KRIKOR BAJAKAJIAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Pursuant to SUP. CT. R. 37.6, Clarendon Foundation states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Clarendon Foundation, its members, and counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondent. Written consent to the filing of this brief has been granted by counsel for all parties, and letters of consent have been lodged with the Clerk. Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the Constitution and democratic government. The Foundation is committed to an ongoing review of the tenets of our constitutional government, in the spirit of George Mason's admonition that "no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamenta! principles." GEORGE MASON, THE VIRGINIA DECLARATION OF RIGHTS, *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 278 (R. Rutland ed. 1970). Because this case raises issues relating to the limits placed by the Eighth Amendment Excessive Fines Clause on the authority of the United States Government, we believe that our perspective will complement the briefs of the parties and assist the Court in resolving the Question Presented.

SUMMARY OF ARGUMENT

This case tests the limits that the Excessive Fines Clause of the Eighth Amendment places on the authority of the United States Government to impose the forfeiture of a person's money, when that person neglects—*even unwittingly*—to report any amount over $10,000 before carrying the money out of the country. The Government contends that the *entire* amount of any unreported funds must be forfeited and that federal courts possess the authority only to determine whether a forfeiture under 18 U.S.C. § 982(a)(1) is "'grossly disproportionate' *to the seriousness of the offense,*" Br. Pet. at 29 (emphasis

added) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983) —*rather than* relative to the culpability of the defendant.

The Government's interpretation of 18 U.S.C. § 982(a)(1) should be rejected because it violates the Constitution in at least two ways. First, it invites the imposition of unconstitutionally excessive fines by permitting the forfeiture of lawfully obtained money from even minimally culpable defendants. Second, it effectively removes an indispensable check on the Government's abuse of criminal forfeiture by all but eliminating judicial review of punishments under this statute. The significance of this latter point is all the more magnified if, as the Government urges, the statute imposes strict liability such that a defendant's culpability should never be a factor in the statute's application. Under that view, an unwitting defendant is deprived of any argument that he was ignorant of the law, as well as the possibility of equitable proportioning of punishment by a federal judge who recognizes the absence of *mens rea* but is powerless to do anything about it, notwithstanding apparent violation of the Excessive Fines Clause.

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 982(a)(1) INVITES THE IMPOSITION OF UNCONSTITUTIONALLY EXCESSIVE FINES BY THREATENING FORFEITURE OF LAWFULLY OBTAINED MONEY FROM MINIMALLY CULPABLE DEFENDANTS.

The forfeiture statute codified at 18 U.S.C. § 982(a)(1) applies, among other times, when a person is convicted of failing to report any amount of currency in excess of $10,000 before taking the money out of the country.

> The court, in imposing sentence on a person convicted of an offense in violation of section . . .

> 5316 . . . of title 31 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

The Government argues that criminal forfeiture under Section 982(a)(1), predicated solely on the failure to file a currency report, satisfies the Excessive Fines Clause without case-specific judicial "inquiry into the culpability of the owner or the property's economic value." Br. Pet. at 11. Contrary to the Ninth Circuit's holding below, *see United States v. Bajakajian*, 84 F.3d 334, 337-38 (9th Cir. 1996), the Government would have this Court construe any amount of unreported funds, regardless of the culpability of the defendant or the source of the funds, as the instrumentality of crime. *See* Br. Pet. at 10, 19-20. According to the Government, the instrumentality of crime, *by definition*, can be forfeited without violating the Eighth Amendment.

> [T]he forfeiture of the instrumentalities of crime, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value.

Br. Pet. at 11; *see also* Br. Pet. at 28-29.

This interpretation of Section 982(a)(1) invites violations of the Excessive Fines Clause by permitting the imposition of unconstitutionally excessive fines even where defendants act without a criminal *mens rea*. That outcome is deeply troubling because the Government carves no room for equitable adjustments to the penalty of wholesale forfeiture. To demonstrate why the Government's position is constitutionally untenable, we

first establish the premise that forfeitures under Section 982(a)(1) are limited by the Excessive Fines Clause.

A. Criminal Forfeitures Imposed Under 18 U.S.C. § 982(a)(1) Are Limited by the Excessive Fines Clause.

The Eighth Amendment prohibits the Government from imposing "excessive fines." U.S. CONST. amend. VIII. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law," *United States v. Halper*, 490 U.S. 435, 447-48 (1989). Whether the Excessive Fines Clause applies to 18 U.S.C. § 982(a)(1) therefore depends not on whether it is "civil or criminal, but rather whether it is punishment." *Austin v. United States*, 509 U.S. 602 (1993). The Court's canvass of the Eighth Amendment's doctrinal underpinning in *Austin* demonstrated that "forfeiture . . . historically [has] been understood, at least in part, as punishment." *Id.* To determine whether 18 U.S.C. § 982(a)(1) imposes punishment within the meaning of the Excessive Fines Clause, one need only look to the words of the statute itself.

Section 982(a)(1) directs the court to forfeit property "in imposing sentence on a person convicted of an offense." The forfeiture order is expressly limited to "property . . . involved in such offense, or any property traceable to such property." This statutory language not only ties forfeiture to various currency offenses, including the failure to report, *cf. Austin*, 509 U.S. 602, but limits

the property subject to forfeiture to property directly "involved" in the criminal offense or "traceable" to such property. This textual evidence of Section 982's punitive dimension cannot be ignored, as even the Government seems to recognize when it characterizes the statute as serving "punitive purposes." Br. Pet. at 11. As this Court said in an earlier case, "The in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander v. United States*, 509 U.S. 544 (1993) (citing *Austin v. United States*, 509 U.S. 602 (1993)).

Inasmuch as criminal forfeitures imposed under Section 982(a)(1) plainly implicate the limitations of the Excessive Fines Clause, the Government's interpretation of the statute is erroneous because it eviscerates—*a priori*—the prospect of a federal judge's making a case-specific adjustment to the quantity of punishment.

B. Because the Government's Interpretation of 18 U.S.C. § 982(a)(1) Would Permit the Forfeiture of Lawfully Obtained Funds from Defendants Lacking Mens Rea, the Risk of Constitutional Violation Is Heightened.

The Government argues that "the Eighth Amendment does not require an additional inquiry into the culpability of the owner or the property's economic value." Br. Pet. at 11. It rationalizes this position on the ground that "such a forfeiture is perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed." *Id.* at 12. Leaving aside the question whether "unreported" necessarily means "concealed,"

there is a serious constitutional problem with the Government's interpretation of the statute.

The problem arises, in part, from a lacuna in the statute that requires the currency report. 31 U.S.C. § 5316(a)(1)(A) does not clearly say whether a person must have knowledge of the law to be guilty of violating the statute. A majority of circuits addressing the question have held that knowledge of the reporting requirement is *not* an element of the offense. *See United States v. $359,500 in United States Currency*, 828 F.2d 930, 934 (2d Cir. 1987); *United States v. $94,000.00 in United States Currency*, 2 F.3d 778, 785 (7th Cir. 1993); *United States v. Twenty Thousand Seven Hundred Fifty-Seven Dollars and Eighty-Three Cents ($20,757.83) Canadian Currency*, 769 F.2d 479, 482 (8th Cir. 1985); *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986). *But see United States v. One (1) Lot of Twenty-Four Thousand Nine Hundred Dollars ($24,900.00) in United States Currency*, 770 F.2d 1530, 1534 (11th Cir. 1985). This trend among the circuits carries grave implications for the constitutionality of the Government's interpretation of Section 982(a)(1).

The Government urges the Court to adopt the rule that any money not reported must be forfeited. When combined with the prevailing view in the circuits, which makes violation of 31 U.S.C. § 5316(a)(1)(A) a strict liability offense, this rule dramatically increases the likelihood that unconstitutionally excessive fines will be imposed. At the same time, moreover, the Government would prevent courts from evaluating the excessiveness of such forfeitures and reducing, as did the district court below, the amount of the forfeiture in order to avoid a constitutional violation. The real-world consequences

of adopting the Government's interpretation are illustrated by the following hypothetical.

Imagine a businessperson who collects rare coins. Suppose he decides to carry his coins, valued at $100,000, to an exhibition in Toronto. On the day of his trip he arrives at the airport 45 minutes late, and in his haste to avoid missing the plane, overlooks the "prominently posted signs informing passengers in several languages of the need to report sums over $10,000.00." *United States v. $94,000.00 in United States Currency*, 2 F3d 778, 784 (7th Cir. 1993). Before the plane departs, a Customs inspector discovers the coins in his luggage, and the man is arrested for failing to make the proper currency report.

At trial the prosecutor proves only that the coins were worth more than $10,000 and that the man was booked for a flight to Toronto. Because the trial occurs outside the Eleventh Circuit, his ignorance of the law is no defense, and the man is convicted of violating 31 U.S.C. § 5316(a)(1)(A). The court never inquires into the source of his money, the use to which it was to be put, or any other measure of personal culpability. The man thus loses his property to the Government solely because he failed to report how much money he was carrying.

The potential consequences of adopting the Government's interpretation of the forfeiture statute are plain. If read as the Government urges, Section 982(a)(1) will permit the Government to impose forfeiture of lawfully obtained funds from defendants, regardless of personal culpability, without any opportunity for the courts to reduce the amount of the forfeiture if it is found to be unconstitutionally excessive. This interpretation risks the Government's acting unlawfully by dramatically increasing the likelihood that unconstitutionally excessive fines will be imposed.

C. The Government's Interpretation of 18 U.S.C. § 982(a)(1) Invites the Imposition of Unconstitutionally Excessive Fines.

This Court has so far declined to establish a test for determining when a particular fine, subject to the limitations of the Excessive Fines Clause, is excessive. *See Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993). It has preferred instead to allow the issue to percolate among the lower courts. *See id.* (citing *Yee v. Escondido*, 503 U.S. 519, 539 (1992)).

Several circuit courts have already responded to this invitation by devising tests to determine when a fine is unconstitutionally excessive. *See, e.g., United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995); *United States v. Chandler*, 36 F.3d 358, 363 (4th Cir. 1994); *United States v. Real Property Located in El Dorado County*, 59 F.3d 974, 985-86 (9th Cir. 1995). *But see United States v. Certain Real Property Located at 11869 Westshore Drive*, 70 F.3d 923, 930 (6th Cir. 1995) (declining to adopt a single test for excessiveness).

While there has been extensive discussion among the courts regarding the appropriate factors to consider when determining whether the imposition of a particular fine would be unconstitutionally excessive, we are aware of no court that entirely omits the culpability of the owner from consideration. Despite this widespread understanding of the law, the Government would have federal judges shut their eyes to the presence or absence of personal culpability. Assuming that the Court accepts the relevance of personal culpability, in any form, as a criterion of validity under the Excessive Fines Clause,

the Government's interpretation of 18 U.S.C. § 982(a)(1) invites the imposition of unconstitutionally excessive fines. For that reason alone the Government's position should be rejected. However, its particular interpretation of the statute raises another constitutional objection as well.

II. THE GOVERNMENT'S POSITION WOULD REMOVE AN INDISPENSABLE CHECK ON THE GOVERNMENT'S ABUSE OF CRIMINAL FORFEITURE BY ALL BUT ELIMINATING JUDICIAL REVIEW.

The Government contends that courts have "a limited role in determining whether a punitive forfeiture is constitutionally excessive." Br. Pet. at 29.

> Under the statutory scheme, a district court does not have discretion to reduce the amount of a civil or criminal forfeiture. Congress entrusted to the Secretary of the Treasury and to the Attorney General the responsibility to decide the circumstances under which such a reduction would be warranted.

Id. at 5. The Government would limit courts faced with an allegedly excessive fine to ask only whether a challenged forfeiture is "'grossly disproportionate' to the seriousness of the offense." *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Because Section 982(a)(1) deems forfeited what the Government construes to be "the instrumentalities of crime," *id.* at 11, the forfeiture "will virtually always constitute a proportionate punishment." *Id.* at 28. This already restricted scope of judicial review is further strait jacketed, in the Government's opinion, by the "substantial deference [that] must be given to Congress' judgment concerning the seriousness of the offense." *Id.* (citing *Harmelin v.*

Michigan, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). "[A]s long as Congress has made a reasonable judgment that the punishment fits the crime, judicial inquiry is at an end." *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Solem v. Helm*, 463 U.S. 277, 303 (1983)).

This argument is objectionable because it undermines the authority of federal courts to vindicate claims under the Excessive Fines Clause. To see just how deeply the Government's argument cuts into the courts' authority of judicial review, consider why courts possess that authority in the first place.

When presented with a justiciable legal dispute over which it has jurisdiction, a court has the *duty* "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This duty occasionally requires courts to apply a constitutional provision in preference to an ordinary statute.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST No. 78, at 525 (Jacob E. Cooke ed., 1961) (Alexander Hamilton). In short, "It is a proposition too plain to be contested that the Constitution controls

any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act." *Marbury*, 5 U.S. (1 Cranch) at 177.

Here, however, the Government has suggested that the Court all but abandon its duty to give the Constitution controlling force over an ordinary statute when the statute is the forfeiture provision contained in 18 U.S.C. § 982(a)(1) and when the controlling constitutional provision is the Excessive Fines Clause. According to the Government, "a district court does not have discretion to reduce the amount of a civil or criminal forfeiture." Br. Pet. at 5. Nothing in that stark, dogmatic statement allows for the possibility that a particular forfeiture under 18 U.S.C. § 982(a)(1) might violate the Excessive Fines Clause. Unfortunately, this absence of qualification cannot be explained away merely as a poor choice of words.

The Government repeatedly urges this Court to find that all criminal forfeitures under Section 982(a)(1) are *inherently* constitutional under the Excessive Fines Clause. This is so, the Government says, because "the most relevant constitutional inquiry is whether the value of the fine is excessive when compared to the seriousness of the offense." Br. Pet. at 28 (citing *Austin v. United States*, 509 U.S. 602 (1993) (Scalia, J., concurring in part and concurring in the judgment). Since "[t]he government has an overriding sovereign interest in controlling what property leaves and enters this country," Br. Pet. at 20 (citing *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977)), the punishment always fits the crime. "[T]he defendant, through his own actions, has put his property in the service of crime, and thereby has set the size of his own financial penalty." Br. Pet. at 28.

This argument, while inventive, proves too much. If valid, it would mean that no forfeiture, under any statute,

could be challenged under the Excessive Fines Clause. The Government, in theory, could always assert "an overriding sovereign interest" in whatever legislative purpose gave rise to a forfeiture statute, and the amount of a forfeiture could always be defended with the argument that "the Defendant set the price of his own fine." The Government's argument thus devolves merely to a clever attempt to sidestep the constitutional requirement that fines imposed by the Government not be "excessive."

The constitutional demands of the Excessive Fines Clause cannot be so easily shrugged off, however. To accept the Government's argument would invite the very governmental abuse that the framers of the Eighth Amendment sought to prevent. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262-68 (1989) (reviewing the historical pedigree of the Excessive Fines Clause). Furthermore, it would run counter to this Court's admonitions regarding the tendency of Government to abuse its forfeiture authority and the indispensable role of judicial review in correcting such abuse.

"Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). Prevention of the unjust imposition of forfeiture is to be found, the Court has said, not in eliminating forfeiture as a law enforcement tool, but in judicial review. *See id.* at 635. Moreover, such review must be especially searching, given the Government's self-interest in imposing fines.

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of

> retribution or deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue . . . . It makes more sense to scrutinize governmental action more closely when the State stands to benefit."

Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality opinion).

For these reasons, the Court should reject the Government's suggestion that 18 U.S.C. § 982(a)(1) permits courts to exercise only an eviscerated form of judicial review.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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September 2, 1997

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(7)

No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER,

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER,

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

A. As we show in our opening brief (at 15-27), the forfeiture of respondent's cash is not an excessive fine, because the cash is an instrumentality of respondent's currency transportation offense and because instrumentality forfeitures are proportionate remedial sanctions, not excessive fines.

1. a. Respondent contends (Br. 15-16) that his unreported cash was not an instrumentality of his offense, because money is both lawful to possess and to transport across the border. Historically, however, property subject to forfeiture has not been limited to property that is unlawful to possess. Instead, forfeiture laws have long authorized the seizure of lawful property when it becomes significantly involved in an offense. See *United States* v. *92 Buena*

Vista Avenue, 507 U.S. 111, 119-121 (1993) (plurality opinion); see also *Austin* v. *United States*, 509 U.S. 602, 627-628 (Scalia, J., concurring in part and concurring in the judgment). In some cases, the inquiry into whether property is significantly involved in an offense presents close questions. Here, however, the cash subject to forfeiture is the very property that respondent sought to transport across the border without the required declaration. Respondent's cash is not merely substantially involved, but entirely and indispensably involved, in that offense.

In that respect, the cash subject to forfeiture in the present case is identical to the goods made subject to forfeiture under early customs laws (see U.S. Br. 15), and the gems that were subject to forfeiture in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam). The early customs laws authorized forfeiture of goods that were entered into the country without the required declarations (Act of July 31, 1789, ch. 5, §§ 12, 23, 1 Stat. 39, 43), and in *One Lot Emerald Cut Stones*, this Court upheld against a double jeopardy challenge the forfeiture of gems that were entered into the country without the required declaration.

Respondent contends (Br. 18) that the gems in *One Lot Emerald Cut Stones* constituted contraband. But it is unclear whether that characterization is correct, or how it would assist him in any event. The gems in *One Lot Emerald Cut Stones* were lawful both to possess and to transport. They were subject to forfeiture in that case only because they were transported across the border without the filing of a declaration. 409 U.S. at 234. The same factors exist here. It is lawful to possess cash and to transport it across the border. But if an attempt is made to transport more

than $10,000 in cash across the border without the required declaration, the money becomes subject to forfeiture as a consequence of the offense.

b. Respondent contends (Br. 16-17) that, if unreported cash is an instrumentality of a currency transportation offense, earned income would have to be an instrumentality of the offense of failing to file an income tax return. There is no historical basis, however, for treating earned income as an instrumentality of the offense of failing to file an income tax return, and the relationship of the money to the offense is different. The cash in a currency transportation offense, like the gems in *One Lot Emerald Cut Stones*, is the very property that is physically transported across the border, and physical transportation of the property is an actus reus of the offense. Although earning income is a necessary precondition to the offense of failing to file an income tax return, the actus reus of the offense is simply the failure to file the return. See 26 U.S.C. 7203. Thus, treating the cash involved in a currency transportation offense as an instrumentality of that offense does not imply that earned income is an instrumentality of the offense of failing to file an income tax return.

c. Respondent also contends (Br. 16) that his cash was not an instrumentality, because there was no indication that his cash was to be used in the commission of "any other criminal offense," such as money laundering. The forfeiture in this case, however, is premised on the involvement of respondent's cash in the offense of willfully violating the prohibition against transporting more than $10,000 across the border without filing the required currency report, not on its involvement in some other offense. See 18 U.S.C. 982(a)(1) (requiring forfeiture

of property involved in a currency transportation offense); 31 U.S.C. 5322(a) (making willful violation of the reporting requirement a criminal offense). Respondent's cash was the central instrumentality of his currency transportation offense; whether it was derived from or involved in some other offense is irrelevant.

2. Respondent and Amicus Clarendon Foundation contend (Resp. Br. 14; Amic. Br. 11-12) that a showing that the property forfeited is an instrumentality of an offense is not sufficient to satisfy the Excessive Fines Clause, and that an inquiry into the culpability of the owner is also necessary. But, as we show in our opening brief (at 15-17), for 200 years, Congress has authorized the forfeiture of property substantially involved in an offense, without an inquiry into the owner's culpability. That practice is constitutional because it is based on a reasonable judgment by Congress that such forfeitures are fair remedial sanctions, regardless of proof of individual culpability. As this Court has explained, "[t]o the extent that such forfeiture provisions are applied to [persons] who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care * * * [over] their property." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-688 (1974). And by dispensing with a judicial inquiry into wrongdoing, such a forfeiture scheme "precludes evasions" by those who may otherwise be able to conceal their culpability. *Van Oster* v. *Kansas*, 272 U.S. 465, 467-468 (1926).

In *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), the Court reaffirmed that the forfeiture of property that is substantially involved in an offense does not violate the Due Process Clause as applied to so-called "innocent owners." The Court relied on the long history of that practice, *id.* at 998-999, and the distinct remedial aims of such forfeitures, *id.* at 1000-1001. Those same considerations demonstrate that the forfeiture of property that is significantly involved in an offense is not an excessive fine.*

B. Even if it were necessary to consider culpability as an element of an excessive fines inquiry, the forfeiture of respondent's unreported cash would still be constitutional because petitioner committed a serious criminal offense. See U.S. Br. 27-34.

1. In arguing that the offense in this case was not serious, Amicus Clarendon Foundation contends (Br. 6-7) that the government did not have to show that respondent knew that it was unlawful to fail to file a currency report. That contention is incorrect.

Under 31 U.S.C. 5316, a currency report must be filed by any person who "knowingly * * * transports, is about to transport, or has transported, monetary instruments of more than $10,000 * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). In a civil case, a violation of that requirement is established by proof that a person knew that he was transporting more than $10,000, without proof that he knew that transporting that amount of cash requires the filing of a report. See *United States* v. *$94,000 in U.S. Currency*, 2 F.3d 778, 784-786 (7th Cir. 1993); *United States* v. *$359,500 in U.S. Currency*, 828 F.2d

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* Since the First Congress, the remedy for mitigating the sometimes harsh consequences of instrumentality forfeitures has been administrative remittance. *Calero-Toledo*, 416 U.S. at 689 n.27. That remedy is available here. 21 U.S.C. 853(i)(1) (criminal forfeiture); 31 U.S.C. 5321(c) (civil forfeiture).

930, 933-934 (2d Cir. 1987); *United States* v. *$47,980 in Canadian Currency*, 804 F.2d 1085, 1090-1091 (9th Cir. 1986).

Respondent, however, was convicted under 31 U.S.C. 5322(a) of the criminal offense of "willfully" failing to file the report required under Section 5316. In *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994), this Court construed the willfulness requirement in Section 5322(a) to require proof that the defendant "knew the [conduct] in which he engaged was unlawful." In order to convict respondent under Section 5322(a), it was therefore necessary to establish that respondent knew it was unlawful for him to transport more than $10,000 across the border without filing a report.

2. Respondent asserts (Br. 22) that he lacked a "criminally culpable intent" because his cash was obtained from a legitimate source and intended for a lawful purpose. Section 5322(a), however, makes it a criminal offense to violate the reporting requirement willfully, regardless of the source or intended use of the cash. 31 U.S.C. 5322(a). Respondent acted with "criminally culpable intent" when he deliberately failed to file such a report, knowing that it was unlawful to do so.

3. Respondent suggests that (Br. 18-20), because there was no proof that he was involved in money laundering or some other criminal activity, his offense was a minor one that does not warrant the forfeiture of the cash that he illegally attempted to export. The best measure of the seriousness of an offense, however, is the maximum penalties authorized by Congress. *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541-542 (1989). Here the maximum penalty for respondent's offense includes five

years' imprisonment, even when there is no other violation of the law. 31 U.S.C. 5322(a). The presence of other violations, such as money laundering, increases the maximum term of imprisonment to ten years' imprisonment. 31 U.S.C. 5322(b). The willful violation of the reporting requirement is therefore itself a serious offense, and the forfeiture of the cash that the defendant has deliberately involved in that offense is not an excessive fine.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

SETH P. WAXMAN
Acting Solicitor General

OCTOBER 1997